

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

TQP DEVELOPMENT LLC * Civil Docket No.
 * 2:11-CV-248
VS. * Marshall, Texas
 *
 * November 25, 2013
NEWEGG, INC. * 1:15 P.M.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JUDGE RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS: MR. MARC FENSTER
 MR. ALEXANDER GIZA
 MR. ADAM S. HOFFMAN
 MR. BENJAMIN WANG
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(Proceedings recorded by mechanical stenography,
transcript produced on CAT system.)

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P R O C E E D I N G S

(Jury out.)

COURT SECURITY OFFICER: All rise.

THE COURT: Be seated, please.

All right. Earlier this morning, some
several hours ago, as a matter of fact now, I met with
Counsel in chambers and we reviewed their joint
submission with regard to the final jury instructions
and verdict form. And the Court conducted an informal
charge conference.

The Court heard numerous comments from
both parties with regard to the charge and the verdict

1 form as well as submission of several authorities, which
2 the Court's had a chance to look at. And the Court has
3 taken all those comments and assertions and authorities
4 into account and has generated a revised final jury
5 instruction charge and verdict form based on my
6 consideration and review of all the matters raised in
7 the informal charge conference.

8 I'm now prepared to go on to the record
9 and have a formal charge conference where each matter
10 may comment -- not comment, but each party may offer any
11 objections to the charge and the verdict form in their
12 present form for the Court to consider.

13 I assume we'll have one representative of
14 each trial team handling this, and so probably the most
15 efficient way is to ask both of those attorneys to go to
16 the podium and stay there, and we'll review these
17 documents on a page-by-page basis. And then I'll hear
18 from both or both sides as we come to whatever matters
19 they believe warrant objection.

20 So if a representative of both Plaintiff
21 and Defendant would go to the podium, we'll conduct the
22 formal charge conference.

23 All right. Turning first to the final
24 jury instructions, I'll ask if there are any objections
25 with regard on any matter on Page 1.

1 MR. REINES: No.

2 MR. WANG: No, Your Honor.

3 THE COURT: Page 2?

4 MR. REINES: No.

5 MR. WANG: No.

6 THE COURT: Page 3?

7 MR. REINES: No.

8 MR. WANG: No.

9 THE COURT: You know, Counsel, we're
10 outside the jury's presence, so I'm not going to insist
11 a whole lot of formality, but no is probably not a good
12 answer. No, Your Honor, would probably be better.

13 Anything on Page 3?

14 MR. REINES: No, Your Honor.

15 MR. WANG: No, Your Honor.

16 THE COURT: Anything on Page 4?

17 MR. REINES: No, Your Honor.

18 MR. WANG: No, Your Honor.

19 THE COURT: Page 5?

20 MR. REINES: No, Your Honor.

21 MR. WANG: No, Your Honor.

22 THE COURT: Page 6?

23 MR. REINES: No, Your Honor.

24 MR. WANG: No, Your Honor.

25 THE COURT: Page 7.

1 MR. REINES: Yes, Your Honor.

2 With respect to the claim constructions,
3 we are preserving our positions as set forth during the
4 claim construction proceedings, and we understand
5 they're not going to be reconsidered now, but just want
6 to be clear for the record on that.

7 In addition, based on the record created
8 here, we would request a supplemental instruction. Not
9 a change of instruction, but a supplemental instruction.
10 And this is moving through the different claim
11 constructions.

12 On the new one of said key, which appears
13 now on Page 8, and we would request that that be
14 supplemented with the statement that the new key value
15 has to be used in the transmitter and receiver at the
16 time required by the claim construction, or at the time
17 required by the definition of -- provided above.

18 Other than that, that's all we have on 7
19 and 8.

20 THE COURT: Was that raised in the
21 informal conference, Counsel?

22 MR. REINES: I did not --

23 THE COURT: I don't recall you raising
24 that then.

25 MR. REINES: I did not propose that

1 specific construction, but in looking at the record, I
2 think it's important.

3 THE COURT: All right. Anything from the
4 Plaintiff on Pages 7 and 8?

5 MR. WANG: No, Your Honor.

6 THE COURT: All right. Defendant's
7 objection with regard to Pages 7 and 8 is overruled.

8 Anything on Page 9?

9 MR. REINES: No, Your Honor.

10 THE COURT: Anything from the Plaintiff
11 on Page 9?

12 MR. WANG: Sorry, Your Honor.

13 No, Your Honor.

14 THE COURT: Page 10.

15 MR. REINES: No, Your Honor.

16 MR. WANG: No, Your Honor.

17 THE COURT: Page 11?

18 MR. REINES: No, Your Honor.

19 MR. WANG: No, Your Honor.

20 THE COURT: Page 12?

21 MR. REINES: No, Your Honor.

22 MR. WANG: No, Your Honor.

23 THE COURT: Page 13?

24 MR. REINES: No, Your Honor.

25 MR. WANG: No, Your Honor.

1 THE COURT: Page 14? And note, Counsel,
2 that there's a 6.1.1 heading there that was not taken
3 out. That's -- that's an error on our part. That will
4 be removed when the final versions are printed, but
5 other than that, is there anything else on Page 14?

6 MR. REINES: Your Honor, this is the
7 begin -- this is the beginning of the discussion on the
8 various prior art legal instructions, and they --
9 includes the secret -- the nature of the secretiveness
10 that is permissible in order for something to be prior
11 art or not. And we note that in general that the Court
12 seems to have ruled with the Plaintiff on that. And we
13 object to that. I can specify the places, but that is a
14 general objection that begins with the non-secret on
15 Page 14, but really on 15 it's, you know, there and then
16 so on and so forth 16, 17, and 18.

17 THE COURT: Well, to the extent that's
18 not too general to respond to, it's overruled. If you
19 want to make a specific objection as we go through each
20 page --

21 MR. REINES: Okay.

22 THE COURT: -- it's however you want to
23 preserve your -- your record, Counsel.

24 MR. REINES: I understand.

25 THE COURT: All right. And is there

1 anything on Page 15?

2 MR. REINES: Just more precisely this --
3 secret use by a third-party other than the inventor's
4 not public would be objected to.

5 THE COURT: Okay. Anything from
6 Plaintiff on 15?

7 MR. WANG: Your Honor, for the record,
8 the top paragraph on Page 15, we would propose adding a
9 statement that in this case, however, because the
10 invention covers a process, the processor must have --
11 the process must have been carried out or performed in
12 public. It's the issue that we raised with Your Honor
13 in the informal conference. We just wanted to have that
14 clear -- clear for the sake of the record.

15 THE COURT: And both of those positions
16 were discussed in the formal -- informal charge
17 conference, and the Court's carefully considered your
18 various positions, but your objections to Page 15 are
19 overruled.

20 Page 16.

21 MR. REINES: Your Honor, the bottom
22 paragraph, starting with if you find -- I can read the
23 whole thing, if necessary, but ends up with are also
24 satisfied, that contains the various points that were
25 discussed previously regarding of -- of what degree of

1 secretiveness is permitted or now permitted and we
2 object to that.

3 THE COURT: All right. Anything from --
4 anything from the Plaintiff on Page 16?

5 MR. WANG: No, Your Honor.

6 THE COURT: All right. Defendant's
7 objection on the bottom page of the Page 16 of the
8 charge is overruled.

9 Anything on Page 17?

10 MR. REINES: No, Your Honor.

11 MR. WANG: No, Your Honor.

12 THE COURT: Page 18?

13 MR. REINES: Yes, Your Honor. The
14 statement in the first paragraph, last sentence,
15 starting with however, which is however a finding of
16 suppression or concealment is not negated merely because
17 the invention has been commercialized through a secret
18 use outside the public domain. We object to that as --
19 pursuant to the prior deliberations.

20 THE COURT: Plaintiff have any objection
21 on Page 18?

22 MR. WANG: No objection, Your Honor.

23 THE COURT: All right. Defendant's
24 objection is overruled.

25 Anything on Page 19?

1 MR. REINES: No, Your Honor.

2 MR. WANG: No, Your Honor.

3 THE COURT: Page 20?

4 MR. REINES: No, Your Honor.

5 MR. WANG: No, Your Honor.

6 THE COURT: Page 21?

7 MR. REINES: Yes, Your Honor. The
8 secondary considerations portion which begins on Page
9 21, starting with in making these assessments and then
10 it lists 1 through 11 and goes through October 6th,
11 1989, we object to those on the grounds that nexus
12 hasn't been laid for that and then -- and highlight, as
13 I did, informally that what's numbered here is No. 8,
14 whether or not others sought or obtained rights to the
15 patent from the patentholder. We would definitely
16 object to any -- any instruction that permits the
17 licenses to be considered for support of validity of the
18 patent.

19 THE COURT: All right. Any objection
20 from Plaintiff?

21 MR. WANG: No, Your Honor.

22 THE COURT: All right. Defendant's
23 objection with regard to the bottom of Page 21 and top
24 of Page 22, particularly the area known as secondary
25 considerations, is overruled.

1 Anything on Page 23?

2 MR. REINES: No, Your Honor.

3 MR. WANG: No, Your Honor.

4 THE COURT: Page 24?

5 MR. REINES: No, Your Honor.

6 MR. WANG: No, Your Honor.

7 THE COURT: Page 25?

8 MR. REINES: No, Your Honor.

9 MR. WANG: No, Your Honor.

10 THE COURT: Page 26?

11 MR. REINES: No, Your Honor.

12 MR. WANG: No, Your Honor.

13 THE COURT: Page 27?

14 MR. REINES: No, Your Honor.

15 MR. WANG: No, Your Honor.

16 THE COURT: Page 28?

17 MR. REINES: No, Your Honor.

18 MR. WANG: No, Your Honor.

19 THE COURT: Any other objections from
20 either party to the proposed final jury instructions?

21 MR. REINES: That is it.

22 MR. WANG: No, Your Honor.

23 THE COURT: All right. Turning to the
24 proposed verdict form, is there objection from either
25 party as to Page 1?

1 MR. WANG: No, Your Honor.

2 THE COURT: Heading -- heading for
3 Question 2 should have been carried forward to the top
4 of the next page. I'll correct that in final print.

5 MR. REINES: Your Honor, just subject to
6 the JMOL objections that we made, which I don't think
7 there's any need to repeat, we don't have any objection
8 beyond that.

9 THE COURT: All right. Anything from the
10 parties on Page 2 or 3 of the verdict form then?

11 MR. REINES: Again, not beyond the JMOL,
12 Your Honor.

13 MR. WANG: No, Your Honor.

14 THE COURT: All right. That will
15 conclude the formal charge conference.

16 We'll stand in recess for a few moments
17 while the Court makes these minor changes and reproduces
18 enough copies so that each member of the jury can have
19 one of the final instructions during deliberations.

20 I understand there are some disputes
21 regarding slides to be used in closing argument. What
22 I'd like to do is recess, start the printing process, if
23 you will, for the final instructions, and I'll come back
24 in and we'll take those up if they're still surviving.
25 I gather they are or not. What's the status?

1 MR. REINES: There's one, Your Honor.

2 There's one slide and one objection.

3 THE COURT: Okay. I was given a larger
4 number earlier. Can somebody produce the one surviving
5 slide there's an objection to so that I can review it?

6 I'll be back in here shortly, and we'll
7 take it up.

8 MR. WANG: Your Honor, I have a hard
9 copy.

10 THE COURT: And this is Plaintiff's slide
11 that Defendant objects to; is that correct?

12 MR. WANG: That's correct, Your Honor.

13 MR. REINES: That's correct.

14 THE COURT: If you'll approach, just hand
15 that up, we'll make a copy of it and I'll bring it back
16 to you.

17 MR. WANG: Okay.

18 THE COURT: Also, the parties need to see
19 Ms. Lockhart with regard to their final exhibit lists.

20 And I'll call for those to be read into
21 the record after the jury retires to deliberate. Then
22 whatever you need to do as far as a written
23 documentation of your final exhibit list for the
24 Courtroom Deputy, I'll assume you're going to consult
25 with her. And if she's happy, I'm happy.

1 MR. WANG: Your Honor, may I raise one
2 thing?

3 THE COURT: Yes.

4 MR. WANG: You -- you may not even need
5 to make a copy of that one slide.

6 THE COURT: I've seen this. Is this the
7 same slide? It hasn't changed any?

8 MR. WANG: That's right, and it -- it
9 relates exactly to the JMOL issue that the Defendant
10 raised earlier and the Court has already ruled on. I
11 believe that the Defendant just wants to state his
12 objection for the record.

13 THE COURT: Is that correct?

14 MR. REINES: Well, yes.

15 THE COURT: I mean, I'm not going to
16 change my JMOL ruling.

17 MR. REINES: No, I understand that. So I
18 just -- I do want -- I think it's important enough to
19 put on the record it -- it relates to the fact that
20 there's no factual basis to show that the block has
21 already been on the link at the time that the new key is
22 being used. Very deceptive and given the claim
23 construction, a substantial concern.

24 THE COURT: All right. Well, let's do
25 this. I'm going to recess. We'll start printing the

1 final copies of the -- the jury charge and the verdict
2 form. I'll be back in. We'll take this up.

3 Is there anything else Counsel's aware of
4 that needs to be covered before we bring the jury in for
5 final argument?

6 MR. FENSTER: Your Honor, may I just
7 inquire if it's the Court's intention that the jury will
8 have a copy during -- of the --

9 THE COURT: No.

10 MR. FENSTER: Thank you.

11 THE COURT: No, I will give it to them --
12 I will give it to the Court Security Officer when they
13 are instructed to retire and deliberate. He'll hand
14 them a clipped version when he takes them to the jury
15 room with eight copies of the final instructions and one
16 clean copy of the verdict form.

17 MR. FENSTER: Thank you, Your Honor.

18 MR. WANG: Your Honor, one last thing
19 with respect to that slide, if I may.

20 THE COURT: Yes, go ahead.

21 MR. WANG: It was -- that slide is
22 actually just a shrunken down version of the board that
23 Dr. Jaeger actually put on the easel in front of the
24 jury and walked them through when he was testifying.

25 THE COURT: All right. Who's going to

1 present closing arguments for the Plaintiff?

2 MR. FENSTER: I will, Your Honor.

3 THE COURT: Are you going to share your
4 time with anyone? Are you doing it all?

5 MR. FENSTER: I'm going to take it all.

6 THE COURT: All right. You need to use
7 at least 50 percent of your time in your first argument.

8 What was your -- what is your preference
9 with regard to warning on your time, Mr. Fenster?

10 That's 17-and-a-half minutes. I can tell
11 you it's 17-and-a-half minutes so you'll know you've
12 passed halfway, or you tell me what you want.

13 MR. FENSTER: 17-and-a-half minutes would
14 be perfect, Your Honor.

15 THE COURT: And then on final argument.

16 MR. FENSTER: And then on final argument,
17 if you'd give me a warning at 5 and 2.

18 THE COURT: 5 and 2.

19 And who's going to present closing
20 arguments for the Defendant?

21 MR. BALDAUF: I am, Your Honor.

22 THE COURT: All right. What would you
23 like as far as a warning, Mr. Baldauf?

24 MR. BALDAUF: 5 minutes and 2 minutes,
25 Your Honor.

1 THE COURT: 5 and 2.

2 MR. BALDAUF: Yes.

3 THE COURT: All right. Then we'll stand
4 in recess, and I'll be back in in a minute. We'll take
5 up this final demonstrative for closing argument.

6 COURT SECURITY OFFICER: All rise.

7 (Recess.)

8 (Jury out.)

9 COURT SECURITY OFFICER: All rise.

10 THE COURT: Be seated, please.

11 All right. With regard to the disputed
12 demonstrative for use in closing arguments, the Court's
13 considered the same, and given that it is almost
14 identical to a jury aid used during the trial without
15 objection, the Court's going to overrule the objection
16 to this as a demonstrative during closing arguments.

17 Is there anything else that we should
18 take up, Counsel, before we proceed to bring the jury
19 in?

20 MR. REINES: Your Honor, on that front,
21 would you mind if we submit an objection with the
22 document so the record shows the posterity to the actual
23 demonstrative that we've objected to?

24 THE COURT: You know, if you want to file
25 something to document the actual demonstrative, that's

1 fine.

2 MR. REINES: That's all I'm saying.

3 Thank you.

4 MR. WANG: Your Honor, I just wanted to
5 read the exhibit we used into the record.

6 THE COURT: We can do that now or we can
7 do it after the closing argument, if you're prepared.

8 Is the other side prepared to do that?
9 There shouldn't be many.

10 MR. BREAN: Yes, there's one, and there's
11 no dispute on this.

12 THE COURT: Okay. Go ahead, Mr. Wang.

13 MR. WANG: DX 22.

14 THE COURT: No objection from the
15 Defendant?

16 MR. BREAN: No, Your Honor.

17 THE COURT: Defendant have anything
18 additional for the record?

19 MR. BREAN: No, Your Honor, we do not.

20 THE COURT: And both sides have consulted
21 with the courtroom deputy with regard to your final
22 jury -- final exhibit list; is that correct?

23 MR. BREAN: Yes, Your Honor, Newegg has.

24 THE COURT: All right.

25 MR. WANG: Yes, Your Honor.

1 THE COURT: Okay. Then are we ready to
2 bring in the jury?

3 MR. FENSTER: We are, Your Honor.

4 MR. BALDAUF: Yes, Your Honor.

5 THE COURT: If you'd bring in the jury,
6 please, Mr. McAteer.

7 COURT SECURITY OFFICER: Yes, sir.

8 All rise for the jury.

9 (Jury in.)

10 THE COURT: Be seated, Ladies and
11 Gentlemen.

12 Members of the Jury, you have now heard
13 the evidence in this case, and I will now instruct you
14 on the law that you must apply to that evidence. It's
15 your duty to follow the law as I give it to you.

16 However, as I've said previously, you,
17 the jury, are the judges of the facts.

18 Do not consider any statement that I have
19 made during the trial or make in these instructions as
20 an indication that I have an opinion about the facts of
21 this case.

22 Also, Ladies and Gentlemen, each of you
23 will be given a written copy of these instructions when
24 you have retired to the jury room. So unless you just
25 want to, there's no express need that you make notes as

1 I go through these final instructions now, because
2 you'll each have your own copy when you retire to
3 deliberate.

4 The attorneys will soon make their
5 closing arguments. The closing arguments of the
6 attorneys are not evidence and are not instructions on
7 the law. They are intended only to assist you in
8 recalling and understanding the evidence and the
9 parties' contentions.

10 A verdict form has been prepared for you.
11 You will take this form with you to the jury room, and
12 when you have reached unanimous agreement as to your
13 verdict, you will have your foreperson fill in, date,
14 and sign the verdict form. Answer each question on the
15 verdict form from the facts as you find them to be.

16 Do not decide who you think should win
17 the case and then answer the questions accordingly.

18 Your answers and your verdict must be
19 unanimous.

20 In determining whether any fact has been
21 proven in this case, there are two types of evidence
22 that you may consider in properly finding the truth as
23 to the facts of this case.

24 One is direct evidence, such as the
25 testimony of an eyewitness. The other is indirect or

1 circumstantial evidence -- that is, the proof of a chain
2 of circumstances that indicates the existence or
3 non-existence of certain other facts.

4 Now, as a general rule, the law makes no
5 distinction between direct or circumstantial evidence,
6 but simply requires that you find the facts based on the
7 evidence presented, both direct and circumstantial.

8 You may, unless otherwise instructed,
9 consider the testimony of all the witnesses, regardless
10 of who may have called them, and all the exhibits
11 received into evidence, regardless of who may have
12 introduced them. You may also consider any stipulations
13 or agreements of the parties in this case.

14 Additionally, when knowledge of a
15 technical subject may be helpful to the jury, a person
16 who has special training or experience in that technical
17 field, called an expert witness, is permitted to state
18 his or her opinions on those technical matters.

19 However, you're not required to accept
20 those opinions. As with any other witness, it is solely
21 up to you to decide whether to rely upon those opinions
22 or not.

23 In determining the weight to give to the
24 testimony of a witness, you should ask yourself whether
25 there was evidence tending to prove that the witness

1 testified falsely concerning some important fact or
2 whether there was evidence that at some other time the
3 witness said or did something or failed to say or do
4 something that was different from the testimony the
5 witness gave before you during this trial.

6 Certain testimony in this case has been
7 presented to you through depositions. A deposition is
8 the sworn, recorded answers to questions asked of a
9 witness in advance of the trial. If a witness cannot be
10 present to testify in person from the witness stand,
11 then the witness's testimony may be presented under oath
12 in the form of a deposition.

13 Before this trial began, attorneys
14 representing the parties in this case questioned these
15 deposition witnesses under oath. A court reporter was
16 present and recorded their testimony. Deposition
17 testimony is entitled to the same consideration as
18 testimony given by a witness in person from the witness
19 stand. Accordingly, you should judge the credibility of
20 and weigh the importance of deposition testimony to the
21 best of your ability just as if the witness had
22 testified before you in open court during this trial.

23 While you should consider only the
24 evidence in this case, you are permitted to draw such
25 reasonable inferences from the testimony and exhibits as

1 you feel are justified in the light of common
2 experience. In other words, ladies and gentlemen, you
3 may make deductions and reach conclusions that reason
4 and common sense lead you to draw from the facts that
5 you have established by the testimony and evidence in
6 the case.

7 You may properly determine that the
8 testimony of a single witness may be sufficient to prove
9 any fact, even if a greater number of witnesses may have
10 testified to the contrary, if after considering all the
11 other evidence, you believe that single witness.

12 By allowing testimony or other evidence
13 to be introduced over the objection of an attorney, the
14 Court did not indicate any opinion as to the weight or
15 effect of such evidence. As stated before, you are the
16 sole judges of the credibility of all the witnesses and
17 what weight and effect to give to all of the evidence in
18 this case.

19 When the Court sustained an objection to
20 a question addressed to a witness, you must disregard
21 the question entirely and may draw no inference from its
22 wording or speculate about what the witness would have
23 said if he or she had been permitted to answer the
24 question.

25 Now, at times during the trial, it was

1 necessary for the Court to talk to the lawyers here at
2 the bench out of your hearing or by calling a recess and
3 talking to them when you were in the jury room and not
4 in the courtroom. This happened because often during a
5 trial some things come up that do not involve the jury.
6 You should not speculate on what was said during these
7 discussions that took place outside of your presence.

8 Certain exhibits shown to you are
9 illustrations. We call these types of exhibits
10 demonstrative exhibits. Demonstrative exhibits are a
11 party's description, picture, or model to describe
12 something involved in the trial. If your recollection
13 of the evidence differs from the demonstrative exhibit,
14 rely on your recollection. Demonstrative exhibits are
15 not evidence.

16 I will now turn to the issue of the
17 burden of proof which I discussed with you at the outset
18 of the case. The Plaintiff, TQP, has the burden of
19 proving infringement by a preponderance of the evidence.
20 Preponderance of the evidence means the evidence that
21 persuades you that a claim is more likely true than
22 untrue.

23 In determining whether any fact has been
24 proved by a preponderance of the evidence, you may,
25 unless otherwise instructed, consider the stipulations,

1 the testimony of all the witnesses, regardless of who
2 called them, and all the exhibits received into
3 evidence, regardless of who may have produced them.

4 The Defendant, Newegg, bears the burden
5 of proving invalidity by clear and convincing evidence.

6 Clear and convincing evidence means
7 evidence that produces in your mind a firm belief or
8 conviction as to the matter at issue. When a party has
9 the burden of proving any claim or defense by clear and
10 convincing evidence, it means that the evidence must
11 have persuaded you that the claim or defense is highly
12 probable.

13 In determining whether any fact has been
14 proven by clear and convincing evidence, you may, unless
15 otherwise instructed, consider the stipulations, the
16 testimony of all witnesses, regardless of who called
17 them, and all exhibits received into evidence,
18 regardless of who may have produced them.

19 Although proof to an absolute certainty
20 is not required, the clear and convincing evidence
21 standard requires a greater degree of persuasion than is
22 necessary for a preponderance of the evidence standard.

23 If the proof establishes in your mind a
24 firm belief or conviction, then the standard has been
25 met.

1 Plaintiff, TQP Development, LLC, which
2 you've heard referred to throughout the trial as TQP,
3 con -- contends that the Defendant, Newegg, Inc., who
4 you've heard referred to throughout the trial simply as
5 Newegg, infringes Claims 1, 6, 8, and 9 of United States
6 Patent 5,412,730, or the '370 pat -- the '730 patent. I
7 may refer to the '730 patent as the patent-in-suit.

8 Collectively, I may refer to Claims 1, 6,
9 8, and 9 of the '730 patent as the asserted claims.

10 The '730 patent covers a method of
11 transmitting data in encrypted form as set forth in the
12 claims. As you've heard, TQP says that the way Newegg
13 encodes or encrypts communications with its website
14 systems using SSL or TLS in combination with RC4 and
15 when coupled with its customer's computers, infringe the
16 claims of the '730 patent. TQP is seeking damages for
17 Newegg's alleged infringement.

18 Newegg denies that it has infringed the
19 '730 patent. Newegg also denies that it has induced
20 others to infringe the '730 patent. Newegg denies that
21 TQP is entitled to any damages or any other relief.

22 Furthermore, Newegg contends that the
23 asserted claims of the '730 patent are invalid.

24 Invalidity is a defense to infringement.
25 Generally, Newegg contends that the asserted claims are

1 invalid because they were not new or would have been
2 obvious to one of ordinary skill in the art.

3 Therefore, even though the United States
4 Patent Mark and -- Patent and Trademark Office or PTO
5 has allowed the asserted claims, you, the jury, must
6 decide whether those claims are invalid.

7 Your job is to decide whether the
8 asserted claims have been infringed and whether any of
9 the asserted claims are invalid. If you decide that any
10 claim of the patent has been infringed and is not
11 invalid, you will then need to decide what amount of
12 money damages, if any, are to be awarded to TQP as
13 compensation for such infringement.

14 Before you decide many of the issues in
15 this case, you will need to understand the role of
16 patent claims. The patent claims are the numbered
17 sentences at the end of each patent. The claims are
18 important because it is the words of the claims
19 themselves that define what the patent covers. The
20 figure and the text -- the figure and the text in the
21 rest of the patent provide a description and/or examples
22 of the invention and provide a context for the claims.
23 But it is the claims that define the breadth of the
24 patent's coverage.

25 Each claim is effectively treated as if

1 it were a separate patent, and each claim may cover more
2 or less than another claim. Therefore, what a patent
3 covers collectively depends on what each of its claims
4 covers. I'll now explain how a claim defines what it
5 covers.

6 A claim sets forth in words a set of
7 requirements. Each claim sets forth its requirements in
8 a single sentence. If a device satisfies each of these
9 requirements in that sentence, then it is covered by the
10 claim.

11 There can be several claims in a patent.
12 A claim may be narrower or broader than another claim by
13 setting forth more or fewer requirements. The coverage
14 of a patent is assessed on a claim-by-claim basis. In
15 patent law, the requirements of a claim are often
16 referred to as the claim elements or claim limitations.

17 For example, a claim that covers the
18 invention of a table may recite the tabletop, four legs,
19 and the glue that secures the legs on the tabletop. The
20 tabletop, legs, and glue are each an element or
21 requirement of the claim.

22 When a product meets all of the
23 requirements of a claim, the claim is said to cover that
24 product and that product is said to fall within the
25 scope of that claim. In other words, a claim covers a

1 product where each of the claim elements or limitations
2 is present in that product. If a product is missing
3 even one limitation or element of a claim, the product
4 is not covered by the claim. If the product is not
5 covered by the claim, that product does not infringe
6 that claim.

7 Patent claims may exist in two forms
8 referred to as independent claims and dependent claims.

9 An independent claim does not refer to
10 any other claim of the patent. It is not necessary --
11 necessary to look at any other claim to determine what
12 an independent claim covers. Asserted Claim 1 in this
13 case is an independent claim.

14 The '730 patent also contains dependent
15 claims. Each dependent claim refers to or depends from
16 an independent claim. A -- a dependent claim includes
17 each of the requirements of the independent claim to
18 which it refers as well as the additional claims
19 described in the dependent claim itself.

20 In order to find infringement of a
21 dependent claim, you must first decide whether the
22 independent claim to which it refers has been infringed.

23 In this case, if you decide that the
24 independent claim, Claim 1, has not been infringed, then
25 the independent claims, Claims 6, 8, and 9, cannot have

1 been infringed.

2 If you decide that the independent claim,
3 Claim 1, has been infringed, then you must separately
4 determine whether each additional requirement of the
5 dependent claims has been included in the accused
6 product. If each additional requirement has been
7 included, then the dependent claim has been infringed.

8 Sometimes the words in a patent claim are
9 difficult to understand, and, therefore, it's difficult
10 to understand what requirements those words impose. By
11 understanding the meaning of the words in a claim and by
12 understanding what the words in a claim set forth, the
13 requirements that a product must meet in order to be
14 covered by the claims, you'll be able to understand the
15 scope of coverage for each claim.

16 Once you understand what each claim
17 covers, then you are prepared to decide the issues that
18 you will be asked to decide, such as infringement and
19 invalidity.

20 You first need to understand what -- what
21 each claim covers in order to decide whether or not
22 there is infringement of the claim and to decide whether
23 or not the claim is invalid. The law says that it is my
24 role to define the terms of the claims, and it is your
25 role to apply my definitions to the issues that you have

1 been asked to decide in this case.

2 Therefore, as I explained to you at the
3 start of the case, I have determined the meaning of the
4 claims, and I have provided for you or to you my
5 definitions of certain claim terms. These are in your
6 juror notebooks. You must accept my definitions of
7 these words in the claims as being correct.

8 It's your job to take these definitions
9 that I have supplied and apply them to the issues that
10 you are asked to decide, including the issues of
11 infringement and invalidity.

12 I will now explain to you the meaning of
13 some of the words of the claim in this case. In doing
14 so, I will explain some of the requirements of the
15 claims. As I have previously instructed you, you must
16 accept my definition of these words in the claims as
17 correct. For any words in the claim for which I have
18 not provided you with a definition, you should apply
19 their common and ordinary meaning.

20 You should not take my definition of the
21 language of the claims as an indication that I have a
22 view regarding how you should decide the issues that you
23 are being asked to decide, such as infringement and
24 invalidity.

25 These issues are yours to decide alone,

1 not mine.

2 You have been provided with copies of the
3 '730 patent and copies of the claim term definitions,
4 and you may use them in your deliberations.

5 The following definitions apply to the
6 language in Claim 1, the sole independent claim asserted
7 in this case.

8 The beginning portion or preamble of
9 Claim 1 uses the word comprising. The word comprising,
10 when used in the preamble, means including or
11 containing. As a result, a device that includes all the
12 limitations of the claim as well as additional elements
13 is covered by that claim.

14 The term sequence of blocks in encrypted
15 form means sequence of two or more blocks that have been
16 encrypted.

17 The term block means a group of bits such
18 as a character, word, or other unit of data.

19 The phrase providing a seed value for
20 both said transmitter and receiver means providing the
21 same seed value to both the transmitter and receiver.

22 The phrase seed value has its plain
23 meaning. However, you should note that the seed value
24 is provided to the transmitter prior to generating the
25 first sequence of pseudo-random key values, and the seed

1 value is provided to the receiver prior to generating
2 the second sequence of pseudo-random key values.

3 The term pseudo-random key values means a
4 sequence of numbers that are generated by supplying a
5 seed value to an algorithm. A sequence of numbers have
6 no apparent regularities, unless the seed value and
7 algorithm are known or determined.

8 The phrase based on said seed value means
9 based exclusively on said seed value.

10 The term each new key value in said
11 sequence being produced at a time dependent upon said
12 predetermined characteristic of said data transmitted
13 over said link means a new key value in the second
14 sequence is produced each time a condition based on a
15 predetermined characteristic of the transmitted data is
16 met at the receiver.

17 The term predetermined means determined
18 before any communication of a sequence of encrypted
19 blocks.

20 The term encrypting the data means
21 covering cleartext data -- converting, rather --
22 converting cleartext data into ciphertext.

23 The phrase a new one of said key values
24 in said first and second sequences being produced each
25 time a predetermined number of said blocks are

1 transmitted over said link means a new key value in the
2 first and second sequence is used each time a
3 predetermined number of blocks have been sent from the
4 transmitter over the communication link.

5 You should note as to the determination
6 of whether a predetermined number of said blocks have
7 been transmitted over said link, the claim explicitly
8 refers to transmission, not to encryption or to some
9 other step of preparing for transmission.

10 The term decrypting the data means
11 converting ciphertext into cleartext.

12 The phrase found in Claim 6, quote, said
13 provided seed value is one of a number of seed values of
14 a plurality of remote locations with which secured
15 communication is required, close quote, means when
16 secured communication is required with two or more
17 remote locations, providing more than one seed value for
18 a number of remote locations for which secured
19 communications is required.

20 The phrase found in Claim 8, quote,
21 associating different ones of seed values with each of a
22 plurality of remote locations with which secured
23 communication is required, close quote, means when
24 secured communication is required with two or more
25 remote locations associating a different seed value with

1 each of the remote locations.

2 As established by the United States Code,
3 Title 35, Section 271, a patent owner has a right to
4 exclude others from making, using, or selling the
5 invention covered by the patent claims during the
6 20-year life of the patent throughout the United States.

7 Infringement occurs when a person without
8 the patent owner's permission makes, uses, sells, or
9 offers for sale something that is within the scope of
10 what the patent covers.

11 Only the claims of a patent can be
12 infringed. To determine whether there is infringement,
13 you must compare the allegedly infringing product with
14 the patent claims as I've defined them for you.

15 In order to infringe a patent claim, a
16 product or method or process must include each and every
17 element of the claim. I'll refer to the separate
18 paragraphs of each of the claims at issue in this case
19 as steps. Sometimes in this case the parties have
20 referred to the steps of the claims as limitations.

21 That's a common patent law expression,
22 but I'll avoid it in the interest of clarity. A claim
23 step is present if it exists in the accused product or
24 process as it is described in the claim language.

25 So in determining whether Newegg

1 infringes TQP's asserted claims, you must determine
2 whether each and every method step recited in the claims
3 in the manner required by the claims is performed by
4 Newegg's accused website systems when coupled with its
5 customers' computers.

6 In order to prove infringement, TQ -- TQP
7 must prove this by a preponderance of the evidence. If
8 any requirement recited in the asserted claims is
9 omitted, then there is no infringement of that claim.
10 You must consider each claim individually.

11 A claim may be infringed directly or
12 indirectly. TQP alleges that Newegg infringes directly
13 by performing some of the claimed method steps itself
14 and by directing or controlling others to perform the
15 remaining steps, such that Newegg should be held
16 responsible for such actions.

17 TQP also alleges that Newegg infringes
18 indirectly by engaging in active inducement of
19 infringement of the claimed invention. I will explain
20 active inducement later.

21 TQP need only show that any one of the
22 claims is infringed to be entitled to damages. In
23 addition, TQP does not need to show that Newegg intended
24 to infringe or knew of the '730 patent.

25 I'll now instruct you on how to decide

1 whether or not Newegg has directly infringed one or more
2 of the asserted claims of the '730 patent.

3 Infringement is assessed on a
4 claim-by-claim basis. Therefore, there may be
5 infringement of one claim, but no infringement of
6 another claim. However, the fact that others have
7 licensed the '730 patent is not evidence of whether
8 Newegg infringes the asserted claims.

9 In order to prove direct infringement of
10 the asserted method claims, TQP must prove by a
11 preponderance of the evidence that Newegg or those it
12 directs or controls, as I will describe in further
13 detail below, actually performed each and every step of
14 the claimed method in the United States.

15 In determining whether a Newegg accused
16 product or service infringes one or more of TQP's
17 asserted claims, you must compare the accused product or
18 service with each and every one of the requirements of a
19 claim to determine whether an accused product or service
20 contains each and every requirement recited in a claim.

21 A claim requirement is present if it
22 exists in an accused product or service or its method of
23 use is just as -- as it is described in the claim
24 language, either as I have explained the language to you
25 or if I did not explain it, as it would be understood by

1 one of skill in the art.

2 If any of the accused products or
3 services omit even a single requirement recited in a
4 claim, then you must find that the particular product or
5 service does not infringe the patent claim.

6 The specific Newegg websites accused of
7 infringing the asserted claims of the '730 patent are
8 known as www.newegg.com and www.newegg.business.com.
9 TQP also claims that Newegg has actively induced others
10 to infringe the '730 patent.

11 Direct infringement that -- excuse me,
12 direct infringement requires that a party perform or use
13 every step of a claimed method. Where no single party
14 performs every step of a claimed method but more than
15 one party performs every step of the method, the claim
16 nonetheless may be directly infringed if one party has
17 control over the entire method so that the steps are
18 attributable to the controlling party.

19 If you find that Newegg itself has not
20 performed every step of the claimed method, you may find
21 that Newegg has directly infringed the claimed method if
22 TQP has proved by a preponderance of the evidence that
23 Newegg directed or controlled its customers' computers
24 to perform the remaining steps of the method so that
25 performance of the entire method is attributable to

1 Newegg.

2 On the other hand, if you find that
3 Newegg itself has not performed every step of the
4 claimed method and Newegg's customers' computers in
5 performing the remaining steps of the method did not act
6 at the direction of or under the control of Newegg, then
7 Newegg is not liable for direct infringement.

8 Mere arm's length cooperation between
9 Newegg and its customers is insufficient to prove Newegg
10 directed or controlled its customers for purposes of
11 direct infringement.

12 TQP alleges that Newegg is liable for
13 infringement by actively inducing its customers to
14 infringe the '730 patent. As with direct infringement,
15 you must determine whether there has been active
16 inducement on a claim-by-claim basis. Liability for
17 active inducement of infringement also requires that all
18 of the claimed method steps were performed.

19 To prove that Newegg induced patent
20 infringement of any of the asserted claims, TQP must
21 prove that it is more likely than not that, one, Newegg
22 knew of the '730 patent; two, Newegg performed some of
23 the steps of the asserted claims; three, Newegg induced
24 its customers to perform the remaining steps of the
25 claim; and four, Newegg's customers, in fact, performed

1 such steps.

2 Newegg induces its customers if it
3 causes, urges, encourages, aids, advises, or otherwise
4 induces them to perform the remaining steps of the
5 claim, knowing that the result constitutes infringement.

6 A find -- a finding of inducement
7 requires both knowledge of the existence of the patent
8 and knowledge that the induced acts constitute patent
9 infringement. The knowledge requirement may be
10 satisfied by showing actual knowledge or will -- willful
11 blindness.

12 A party is willfully blind if it believed
13 there was a high probability that the acts constituted
14 patent infringement and took deliberate actions to avoid
15 learning of the infringement.

16 Active inducement of infringement cannot
17 occur unintentionally. Rather, to find such, you must
18 find that Newegg specifically intended its customers to
19 infringe the '730 patent or that Newegg believed that
20 there was a high probability that its customers would
21 infringe the '730 patent but remained willfully blind to
22 the infringing nature of its customers' acts.

23 In considering whether or not Newegg had
24 a specific intent to induce infringement, you may
25 consider evidence as to whether Newegg had a good-faith

1 belief that they did not infringe any claims of the
2 patent and whether Newegg had a good-faith belief that
3 the patent claims are invalid.

4 TQP must prove that each of the above
5 requirements is met by a preponderance of the evidence;
6 that is, more likely than not that the requirements have
7 been met. In addition, you must determine whether there
8 has been active inducement on a claim-by-claim basis.

9 To be clear, all the steps of a claimed
10 method must be performed in order to find induced
11 infringement, but it is not necessary to prove that all
12 the steps were committed by a single entity.

13 Newegg contends that all of the claims of
14 the '730 patent that TQP is asserting are invalid.

15 Patent invalidity is a defense to patent
16 infringement. As the '730 patent was issued by the
17 United States Patent and Trademark Office, it is
18 presumed to be a valid patent. That means that the fact
19 that a patent was issued to a particular person does not
20 guarantee that the patent is valid.

21 But once it issues, the law says that if
22 a challenger wants to show that it is invalid, the
23 challenger has to make that showing by clear and
24 convincing evidence. So patent invalidity is one of the
25 issues in this case to which the clear and convincing

1 evidence standard applies.

2 In deciding whether particular claims are
3 invalid, you will interpret the claims in the same way
4 that you have in deciding infringement.

5 I will now instruct you on the rules that
6 you must follow in deciding whether Newegg has proven
7 that Claims 1, 6, 8, and 9 of the '730 patent are
8 invalid.

9 To prove that any claim in a patent is
10 invalid, Newegg must persuade you by clear and
11 convincing evidence. Even though the PTO Examiner has
12 allowed the claims of a patent and the patent is
13 presumed valid, you have the responsibility for deciding
14 whether the claims of the patent are valid.

15 For a patent to be valid, the invention
16 claimed in the patent must be new and non-obvious. The
17 terms new and nonobvious have special meanings under the
18 patent laws, and I'll explain those terms to you as we
19 discuss Newegg's grounds for asserting invalidity.

20 Newegg contends that the asserted claims
21 are invalid as being anticipated and/or obvious in view
22 of the prior art. Prior art may include items that were
23 publicly known or that have been used or offered for
24 sale, publications, or patents that disclose the claimed
25 invention elements or elements of the claimed invention.

1 To be prior art, the item or reference
2 must have been made, known, used, published, or patented
3 before October the 6th, 1989.

4 In order for someone to be entitled to a
5 patent, the claimed invention must be actually new or
6 novel, meaning that it is not present or disclosed in
7 the prior art. In general, inventions are new when the
8 claimed product or process has not been made, used or
9 disclosed before?

10 If a claimed invention does not exist in
11 the prior art -- excuse me -- if a claimed invention
12 does exist in the prior art, it is said to be
13 anticipated. Anticipation must be determined on a
14 claim-by-claim basis.

15 For the asserted claim to be invalidated
16 as anticipated, Newegg must show that all of the
17 requirements of that claim were present in a single
18 previous device or method that was known of, used, sold,
19 offered for sale, or described in a single pre -- piece
20 of prior art, such as a printed publication, patent,
21 product, or process that predates the claimed invention.

22 We refer to such prior art as
23 anticipating prior art. To anticipate the invention,
24 the prior art does not have to use the same words as the
25 claim, but all of the requirements of the claim must

1 have been disclosed or present in a single piece of
2 prior art.

3 Each and every claim limitation must
4 expressly be present or implied to a person having
5 ordinary skill in the art of the technology of the
6 invention so that looking at that piece of prior art,
7 that person could make or use or practice the claimed
8 invention.

9 Newegg contends that Claims 1, 6, 8, and
10 9 of the '730 patent are invalid because the claimed
11 invention is anticipated or because TQP lost the right
12 to obtain a patent. Newegg must convince you of this by
13 clear and convincing evidence.

14 Here is a list of the ways that Newegg
15 can show that Claims 1, 6, 8, and 9 of the '730 patent
16 are invalid as anticipated because they were not new or
17 novel.

18 1. If the claimed invention was known to
19 or used by others in the United States before October
20 the 6th, 1989. An invention is known when the
21 information about it was reasonably accessible to the
22 public on that date.

23 2. If the claimed invention was already
24 patented or described in a printed publication anywhere
25 in the world before October the 6th, 1989. A

1 description it a printed publication only if it was
2 publicly accessible.

3 3. If the claimed invention was already
4 described in a printed publication anywhere in the world
5 more than a year before October the 6th, 1989, which is
6 the effective filing date of the application for the
7 '730 patent.

8 4. If the claimed invention was publicly
9 used, sold, or offered for sale in this country more
10 than one year before October the 6th, 1989, which is the
11 effective filing date of the application for the '730
12 patent; or.

13 5. If the claimed invention was already
14 made by someone else in the United States before October
15 the 6th, 1989, who had not abandoned, suppressed, or
16 concealed the invention.

17 A patent claim is also invalid, if the
18 invention recited in that claim was publicly known or
19 publicly used in the United States by someone other than
20 the inventor before the patent applicant invented it,
21 which here is October the 6th, 1989.

22 An invention was in public use by another
23 if the claimed invention was accessible to the public or
24 commercially exploited in a non-secret way. Factors
25 relevant to the determination of whether a use was

1 public include the nature of the activity -- activity
2 that occurred in public, public access to the use,
3 confidentiality obligations imposed upon observers,
4 commercial exploitation, and the circumstances
5 surrounding testing and experimentation.

6 An invention is publicly used if it is
7 used by the inventor or by a person who is not under any
8 limitation, restriction, or obligation of secrecy to the
9 inventor. The absence of affirmative steps to conceal
10 the use of the invention is evidence of a public use.

11 However, secret use by a third party
12 other than the inventor is not public, unless members of
13 the public have access to the invention. As long as the
14 use of the invalidating aspects of the prior art was
15 public, access to the inner workings of the prior art is
16 not required for use to be considered a public use for
17 purposes of determining invalidity.

18 In order to be a public use, the
19 invention must also have been ready for patenting at the
20 time of the alleged public use. An invention is ready
21 for patenting either when it is reduced to practice or
22 when the inventor has prepared drawings or other
23 descriptions of the invention sufficient to allow a
24 person of -- person of ordinary skill in the art to make
25 or use the invention.

1 An -- an invention is reduced to practice
2 when it has been (1) constructed or performed within the
3 scope of the patent claims; and (2) determined that it
4 works for its intended purpose.

5 The claimed invention is ready for
6 patenting when there is reason to believe that it would
7 work for its intended purpose.

8 Finally, to show anticipation of the
9 patented invention based on public -- excuse me -- prior
10 public knowledge or use by another, Newegg must show by
11 clear and convincing evidence that the process publicly
12 known or used by another disclosed all of the elements
13 of each claim of the patent that Newegg contends is
14 invalid.

15 Newegg contends that Claims 1, 6, 8, and
16 9 of the '730 patent was anticipated because the
17 invention defined in that -- in those claims was on sale
18 in the United States more than one year before the
19 patentee filed his patent application on October the
20 6th, 1989.

21 A patent claim is invalid if more than
22 one year before the filing date of the patent the
23 claimed invention was both (1), subject to commercial
24 offer for sale in the United States, and (2) ready for
25 patenting. Such is called the on-sale-bar.

1 An invention was subject to a commercial
2 offer for sale if the claimed invention was embodied in
3 an item that was actually sold or offered for sale.

4 A sale, for purposes of the on-sale-bar,
5 is a contract between parties to give and to pass rights
6 of property for consideration which the buyer pays or
7 promises to pay the seller for things bought or sold.

8 An offer for sale is made if another
9 party could make a binding contract by simply accepting
10 the offer. It is not required that a sale was actually
11 made.

12 In this case, the claimed invention
13 involves a method or process. A method or process is
14 not sold in the same sense as a tangible item is sold.
15 Merely granting a license to a process to allow the
16 licensee to commercialize the process without more does
17 not constitute a sale for purposes of the on-sale-bar.

18 However, a commercial transaction
19 arranged or described as a license may nonetheless
20 amount to a sale. For example, a standard computer
21 software license may be considered -- can be considered
22 a sale because the product is just as immediately and
23 completely transferred to the buyer as if it were sold.

24 Further, merely providing the buyer or
25 licensee with knowledge of the process and granting him

1 or her the freedom to carry it out pursuant to the terms
2 of the transaction without more does not constitute a
3 sale for purposes of the on-sale-bar.

4 However, a seller or licensor actually
5 performing the process himself for consideration would
6 constitute a sale of the process for purpose of the
7 on-sale-bar.

8 In this case, Newegg contends that the
9 license and development agreement between RSA and Lotus
10 Corporation was an offer for sale of the RC4 algorithm.
11 Newegg also contends that a software development

12 agreement between Lotus Corporation and
13 Iris Associates, Inc., was a sale of technology that
14 would invalidate the '730 patent.

15 If you find that neither agreement
16 constitutes a sale or offer for sale of the claimed
17 process, then neither agreement will trigger invalidity
18 based upon the on-sale-bar. If, on the other hand, you
19 find that either or both agreements constitute a sale or
20 offer for sale of the claimed process, you need to
21 additionally consider whether the process sold or
22 offered for sale was kept secret and remained secret
23 even after the sale.

24 If the process was kept secret and
25 remained secret even after the sale, such sale or offer

1 for sale does not trigger invalidity, based upon the
2 on-sale-bar. However, if the process was not kept
3 secret or did not remain secret after the sale, such
4 sale or offer for sale will trigger invalidity, based
5 upon the on-sale-bar, given that all other requirements
6 of the on-sale-bar are also satisfied.

7 If you find that the claimed process was
8 subject to one or more non-credit commercial offers for
9 sale more than one year before the patentee filed his
10 U.S. patent application on October the 6th, 1989, to
11 invalidate the patent claimed -- the claimed process
12 must also have been ready for patenting more than one
13 year before October the 6th, 1989.

14 An invention is ready for patenting
15 either when it is reduced to practice or when the
16 inventor has prepared drawings or other descriptions of
17 the invention sufficient to allow a person of ordinary
18 skill in the art to make or use the invention.

19 An invention is reduced to practice when
20 it has been (1) constructed or performed within the
21 scope of the patent claims, and (2) determined that it
22 works for its intended purpose. The claimed invention
23 is ready for patenting when there is reason to believe
24 that it would work for its intended purposes.

25 In this case, Ladies and Gentlemen, the

1 Court has already determined and you are instructed that
2 RC4 was ready for patenting more than one year before
3 October the 6th, 1989.

4 Finally, to show anticipation of the
5 patented invention, based upon the on-sale-bar, Newegg
6 must show by clear and convincing evidence that the
7 process sold or offered for sale disclosed all of the
8 elements of each claim of the patent that Newegg contend
9 system invalid.

10 Newegg contends that various claims of
11 the patent-in-suit are invalid because the inventions
12 defined by those claims were invented by another person
13 before the patentee invented his invention.

14 A patent claim is invalid if the
15 invention defined by that claim was invented by another
16 person in the United States before it was invented by
17 the patentee, and that other person did not abandon,
18 suppress, or conceal the invention.

19 Newegg must show by clear and convincing
20 evidence either that before the patentee invented his
21 invention another person reduced to practice a method
22 that included all of the elements of the relevant claims
23 or that the other person was first to conceive the
24 invention and that he exercised reasonable diligence in
25 later reducing the invention to practice.

1 In addition, Newegg must show that the
2 other person's device was sufficiently developed that
3 one skilled in the art would have recognized that it
4 would work for its intended purpose.

5 If the prior invention was abandoned,
6 suppressed, or concealed, it cannot invalidate the
7 claims. An invention was abandoned, suppressed, or
8 concealed if (1) the other person actively concealed the
9 invention from the public; or (2) the other person
10 unreasonably delayed in making the invention publicly
11 known.

12 Generally, an invention was not
13 abandoned, suppressed, or concealed if the invention was
14 made public, sold, or offered for sale or otherwise used
15 for a commercial purpose. However, a finding of
16 suppression or concealment is not negated merely because
17 the invention has been commercialized through a secret
18 use outside the public domain.

19 Finally, to show anticipation of the
20 patented invention, Newegg must show by clear and
21 convincing evidence that the prior invention disclosed
22 all of the elements of each claim of the patent that
23 Newegg contends is invalid.

24 Even though an invention may not have
25 been identically disclosed or described before it was

1 made by an inventor in order to be patentable, the
2 invention must also not have been obvious to a person of
3 ordinary skill in the field of technology of the patent
4 at the time the invention was made.

5 This means that even if all the
6 requirements of the claim cannot be found in a single
7 prior art reference that would anticipate the claim, a
8 person of ordinary skill in the field of the invention
9 who knew about all of the prior art would have come up
10 with the claimed invention.

11 Newegg contends that the asserted claims
12 of the patent are invalid because the inventions were
13 obvious. Newegg may establish that a patent claim is
14 invalid by showing by clear and convincing evidence that
15 the claimed invention would have been obvious to persons
16 having ordinary skill in the art at the time the
17 application was filed.

18 In determining whether or not Newegg has
19 established obviousness of a claim of the patent-in-suit
20 by clear and convincing evidence, you must consider the
21 following:

22 1. The scope and content of the prior
23 art;

24 2. The level of ordinary skill in the
25 field of technology at the time the invention was made;

1 and.

2 3. The differences if -- if any, between
3 each claim of the patent and that prior art;

4 4. Any secondary considerations relating
5 to obviousness or non-obviousness of the invention.

6 I will now describe in more detail the
7 specific determinations you must make in deciding
8 whether or not the claimed invention would have been
9 obvious. A claim does not need to be both anticipated
10 and obvious in order to be invalid.

11 In determining whether or not the
12 invention is invalid, you must determine the scope and
13 content of the prior art at the time the invention was
14 made. You must decide whether the specific references
15 relied upon by Newegg in this case are prior art of the
16 invention described in the asserted claims of the '730
17 patent.

18 Prior art includes previous devices,
19 articles, and methods that were publicly used or offered
20 for sale and printed publications or patents that
21 disclose the invention or elements of the invention.

22 Once you decide whether or not specific
23 references are prior art, you must also decide what
24 those references would have disclosed or taught to one
25 having ordinary skill in the field of technology of the

1 patent at the time the invention was made.

2 You have heard the term a person or -- a
3 person of ordinary skill in the field or the art a lot
4 in this case. That term gets used frequently in patent
5 law, and it is particularly important in deciding
6 whether an invention would have been obvious at the time
7 it was invented.

8 A person of ordinary skill in the art is
9 a hypothetical person of average education and training
10 in the particular field, but who is aware of all the
11 relevant prior art.

12 In deciding what the level of ordinary
13 skill in the field is, you should consider all the
14 evidence introduced at trial, including but not limited
15 to, one, the levels of education and experience of the
16 inventors and other persons actively working in the
17 field. Two, the types of problems encountered in the
18 field. Three, prior art solutions to those problems.
19 Four, rapidity with which innovations are made. And
20 five, the sophistication of the technology.

21 The actual inventor's skill is irrelevant
22 to this -- to this inquiry.

23 The next question you must answer in
24 determining whether or not the invention was obvious at
25 the time it was made is what differences there are, if

1 any, between the prior art and the patented invention.

2 In analyzing this issue, do not focus
3 solely on the differences between the prior art and the
4 invention because the test is not whether there are
5 differences. Rather, the test is whether or not the
6 invention as a whole would have been obvious to one
7 having ordinary skill in view of all the prior art at
8 the time the invention was made.

9 If you conclude that the prior art discloses
10 all the elements of the claimed invention, but those
11 elements are in separate items, you must then consider
12 whether or not it would have been obvious to combine
13 those items. A claim is not obvious merely because all
14 of the -- all of the elements of the claims already
15 existed.

16 In determining whether an invention is
17 obvious, it can be important to identify a reason that
18 would have prompted a person of ordinary skill in the
19 relevant field to combine the elements in a way that the
20 claimed new invention does. This is also because
21 inventions in most, if not all, instances rely upon
22 building blocks long since uncovered and claimed
23 discoveries almost of necessity that will be
24 combinations of what in some sense is already known.

25 One way to decide whether one of ordinary

1 skill in the art would combine what is described in
2 various items of prior art is whether there is some
3 teaching, suggestion, or motivation in the prior art for
4 a skilled person to make the combination covered by the
5 patent claims. Motivation can be implicit or explicit.

6 In considering whether a claimed
7 combination of prior art elements is obvious, you must
8 consider whether the improvement is more than the
9 predictable use of prior art elements, according to
10 their established functions. When a patent simply
11 arranges old elements with each performing the same
12 function it had been known to perform and yields no more
13 than one would expect from such an arrangement, the
14 combination is obvious.

15 It is common sense that familiar items
16 may have obvious uses beyond their primary purposes, and
17 a person of ordinary skill often will be able to fit the
18 teachings of multiple patents together like pieces of a
19 puzzle. Multiple references in the prior art can be
20 combined to show that a claim is obvious. Any need or
21 problem known in the field and addressed by the patent
22 can provide a reason for combining the elements in the
23 manner claimed.

24 To determine whether there was an
25 apparent reason to combine the known elements in the way

1 the patent claims, you can look to interrelated
2 teachings of multiple patents to the effects of demands
3 known to the design community or present in the
4 marketplace and to the background knowledge possessed by
5 a person of ordinary skill in the art.

6 Neither the particular motivation, nor
7 the alleged purpose of the patentee controls. One of
8 ordinary skill in the art is not confined only to prior
9 art that attempts to solve the same problem as the
10 patent claim. Teachings, suggestions, and motivations
11 may also be found within the knowledge of a person of
12 ordinary skill in the art, including inferences and
13 creative steps that a person of ordinary skill in the
14 art would employ.

15 You may also consider such additional
16 factors, whether the prior art teaches or suggests the
17 desirability of combining elements in the claimed
18 inventions, whether the prior art teaches away from
19 combining elements in the claimed inventions, whether it
20 would have been obvious to try the combinations of
21 elements, such as where there is a design need or market
22 pressure to solve a problem -- and there are -- and
23 there are a finite number of identified, predictable
24 solutions, and whether the change resulted more from
25 design incentives or other market -- or other market

1 forces.

2 To find that prior art rendered the
3 invention obvious, you must find that the prior art
4 provided a reasonable expectation of success. Obvious
5 to try is not sufficient in unpredictable technologies.
6 In -- in determining whether a claimed invention was
7 obvious, consider each claim separately. Do not use
8 hindsight -- that is, consider only what was known to a
9 person of ordinary skill in the field of the invention
10 at the time the claimed invention was made.

11 In making these assessments, you should
12 take into account any objective evidence, sometimes
13 called secondary considerations, that may have existed
14 at the time of the invention and afterwards that may
15 shed light on the obviousness or not of the claimed
16 invention, such as, one, whether or not the invention
17 have achieved commercial success based on the merits of
18 the claimed invention, rather than design needs or
19 market pressure, advertising, or similar activities.

20 Two, whether or not the invention
21 proceeded in a direction contrary to accepted wisdom in
22 the field. Three, whether or not the invention
23 satisfied a long-felt need. Four, whether or not others
24 had tried but failed to make the invention. Five,
25 whether or not others copied the invention. Six,

1 whether or not the invention achieved any unexpected
2 results. Seven, whether or not the invention was
3 praised by others. Eight, whether or not others sought
4 or obtained rights to the patent from the patentholder.
5 Nine, whether or not experts or those skilled in the
6 field at the making of the invention expressed surprise
7 or disbelief regarding the invention. 10, whether or
8 not others had an ordinary skill in the field of the
9 invention independently made the claimed invention at
10 about the same time the inventor made the invention.
11 11, whether there were changes or related technologies
12 or market needs contemporaneous with the invention.

13 The presence or absence of any of the
14 above factors may help you decide whether or not the
15 invention was obvious. Even if you conclude that some
16 of the above indicators have been established, those
17 factors should be considered along with all the other
18 evidence in this case in determining whether Newegg has
19 proved that the claimed invention would have been
20 obvious as of October the 6th, 1989.

21 I have now instructed you as to the law
22 governing TQP's claims of patent infringement and
23 Newegg's claims of invalidity. If you determine that
24 TQP has proved any of its patent infringement claims
25 against Newegg and that the claims of the '730 patent

1 that are infringed are not invalid, you must determine
2 the amount of damages to which TQP is entitled.

3 You should not interpret the fact that I
4 am giving you instructions about damages as any
5 indication that TQP should win on its patent
6 infringement claims. It is your task first to decide
7 whether Newegg is liable for the claims asserted against
8 them. Only if you find Newegg liable on one or more of
9 the patent infringement claims will you need to turn to
10 the question of damages.

11 The damages you award must be adequate to
12 compensate TQP for the infringement. They are not meant
13 to punish an infringer. Your damages award, if you
14 reach this issue, should put TQP in approximately the
15 same financial position that it would have been in had
16 the infringement not occurred.

17 TQP has the burden to establish the
18 amount of its damages by a preponderance of the
19 evidence. In other words, you should award only those
20 damages that TQP establishes that it more likely
21 suffered than not.

22 The patent owner is not entitled to
23 damages that are remote or speculative. If you decide
24 to award compensatory damages, you should be guided by
25 dispassionate common sense.

1 Computing damages may be difficult, but
2 you must not let that difficulty lead you to engage in
3 arbitrary guesswork. On the other hand, the law does
4 not require that a party prove the amount of its losses
5 with mathematical precision but only with as much
6 definiteness and accuracy as the circumstances permit.

7 Difficulty in ascertaining the amount of
8 damages is not to be confused with the right of
9 recovery.

10 Under the patent laws, TQP cannot recover
11 damages for any direct infringement that occurred more
12 than six years prior to the -- to the date it filed this
13 lawsuit, on May the 6th, 2011, or after the expiration
14 date of the patent, May the 2nd, 2012. Thus, the
15 relative timeframe for calculating direct infringement
16 damages from Newegg is May the 6th, 2005 to May the 2nd,
17 2012.

18 If you find that Newegg is not liable for
19 direct infringement, but is liable for active inducement
20 of infringement, then the relative damage period begins
21 only after TQP gave notice of its patent rights by
22 filing this lawsuit against notice and once Newegg then
23 developed the requisite intent to cause infringement of
24 the patent.

25 Thus, the earliest date for damages

1 resulting from inducement would be May the 6th, 2011,
2 the date this lawsuit was filed. And no damages may be
3 awarded for act -- active inducement after the patent
4 expired on May the 2nd, 2012. Thus, in considering
5 damages for inducement of infringement, the relevant
6 time period is no earlier than May the 6th, 2011, and no
7 later than May the 2nd, 2012.

8 There are different types of damages that
9 TQP may be entitled to recover. In this case, TQP seeks
10 a reasonable royalty. A reasonable royalty is defined
11 as the money amount TQP or the predecessor patent owner
12 and Newegg would have agreed upon as a fee for use of
13 the invention at the time prior to when infringement
14 began.

15 A reasonable royalty can be a single lump
16 sum amount, or it can be a running royalty. A lump sum
17 amount is a royalty payment where the patent owner
18 receives a single upfront payment. A running royalty is
19 a royalty where the patent owner collects ongoing per --
20 per-unit or percentage payments over a period of time.

21 I will give you more detailed
22 instructions regarding damages shortly. Note, however,
23 that if you find Newegg is liable for infringement, then
24 TQP is entitled to recover no less than a reasonable
25 royalty to compensate for the infringement.

1 A royalty is a payment made to a patent
2 holder in exchange for the right to make, use, or sell
3 the claimed invention. A reasonable royalty is the
4 amount of royalty payment that a patent holder and the
5 infringer would have agreed to in a hypothetical
6 negotiation taking place between them at a time prior to
7 when the infringement first began.

8 In considering this hypothetical
9 negotiation, you should focus on what the expectations
10 of the patent holder and the infringer would have been
11 had they entered into an agreement at that time and had
12 they acted reasonably in their negotiations.

13 In determining this, you must assume that
14 both parties believed the patent was valid and
15 infringed, and the patent holder and infringer were
16 willing to enter into an agreement.

17 The reasonable royalty you determine must
18 be a royalty that would have resulted from this
19 hypothetical negotiation and not simply a royalty either
20 party would have preferred. Evidence of things that
21 happened after the infringement first began can be
22 considered in evaluating the reasonable royalty to the
23 extent that the evidence aids in assessing what royalty
24 would have resulted from a hypothetical negotiation.

25 In this case, the parties agree that the

1 hypothetical negotiation for the licensing of the '730
2 patent would have taken place in January of 2004. The
3 parties disagree on whether the hypothetical negotiation
4 for the '730 patent would have resulted in a lump sum or
5 a reasonable royalty. In determining the reasonable
6 royalty, you should consider all the facts known and
7 available to the interested parties at the time of the
8 hypothetical negotiation.

9 I will list for you a number of factors
10 you may consider. This is not every possible factor,
11 but it will give you an idea of the kinds of things to
12 consider in setting a reasonable royalty.

13 1. Any royalties received by TQP or its
14 predecessors for licensing the patents-in-suit,
15 providing or tending to prove an established royalty --
16 proving or tending to prove an established royalty;

17 2. Any rates paid by Newegg for the use
18 of other patents comparable to the patent-in-suit;

19 3. The nature and scope of the license
20 as exclusive or non-exclusive or as restricted or
21 unrestricted in terms of territory or with respect to
22 the parties to whom the product may be sold;

23 4. Whether or not TQP or any of its
24 predecessors had an established policy and marketing
25 program to maintain its patent exclusivity by not

1 licensing others to use the inventions or by granting
2 licenses under special conditions designed to preserve
3 that exclusivity;

4 5. The commercial relationship between
5 the licensor and licensee, such as whether they are
6 competitors in the same territory and the same line of
7 business;

8 6. The effect of selling the patented
9 inventions in promoting sales of other products or
10 inventions of Newegg, the existing value of the
11 inventions to TQP, and its predecessors as a generator
12 of sales of its non-patented items, and the extent to
13 which such -- such derive -- and the extent of such
14 derivative or convoyed sales;

15 7. The duration of the patent and the
16 term of the hypothetical license;

17 8. The established profitability of the
18 inventions, their commercial success, and their current
19 popularity;

20 9. The utility and advantages of the
21 patented inventions over the old modes or devices, if
22 any, that had been used for achieving similar results;

23 10. The nature of the patented
24 inventions, the character of the commercial embodiment
25 of the inventions as owned and produced by TQP, and its

1 predecessors and the benefits to those who have used the
2 inventions;

3 11. The extent to which Newegg has made
4 use of the patented inventions and any evidence that
5 shows the value of that use;

6 12. The portion of the profit or of the
7 selling price that may be customary in the particular
8 business or in comparable businesses to allow for the
9 use of the inventions or analogous inventions;

10 13. The portion of the profits that is
11 due to the patented inventions as compared to the
12 portion of the profits due to other factors, such as
13 unpatented elements or unpatented manufacturing
14 processes or features or improvements developed by
15 Newegg;

16 14. Expert opinions as to what a
17 reasonable royalty would be;

18 15. The amount that a licensor and
19 licensee would have agreed upon, if both parties had
20 been reasonably and voluntarily trying to reach an
21 agreement.

22 In determining a reasonable royalty, you
23 may also consider whether Newegg had commercially
24 acceptable non-infringing alternatives that were
25 available at the time at which the interested parties

1 would have negotiated a license and whether that would
2 have affected the reasonable royalty the parties would
3 have agreed upon.

4 A non-infringing alternative must be an
5 alternative solution that does not infringe the patent
6 because it is licensed under the patent or it does not
7 perform all the steps required by the claims of the
8 patent. A non-infringing alternative is available if
9 Newegg had all the necessary equipment, know-how, and
10 experience to use the alternative at the time of the
11 hypothetical negotiation. The alternative must also be
12 acceptable to Newegg's customers, but not the public in
13 general.

14 No one factor is dispositive, and you can
15 and should consider the evidence that is presented to
16 you in this case on each of these factors. You may also
17 consider any other factors which in your mind would have
18 increased or decreased the royalty the infringer would
19 have been willing to pay and the patent holder would
20 have been willing to accept acting as normally prudent
21 business people.

22 The final factor establishes the
23 framework which you should use in determining a
24 reasonable royalty -- that is, the payment that would
25 have resulted from negotiation between the patent holder

1 and the infringer taking place at a time prior to when
2 the infringement began.

3 These complete my instructions at this
4 point, Ladies and Gentlemen, and we will now hear
5 closing arguments for the attorneys from the parties.

6 We will first hear closing arguments from
7 the Plaintiff.

8 Mr. Fenster, you may address the jury.

9 MR. FENSTER: Thank you, Your Honor. May
10 I have just a moment?

11 THE COURT: You may.

12 MR. FENSTER: Your Honor, may I access
13 the board and the ELMO throughout?

14 THE COURT: Without leave necessary.

15 MR. FENSTER: Thank you.

16 THE COURT: All right. You may proceed,
17 Counsel.

18 MR. FENSTER: Thank you, Your Honor. May
19 it please the Court.

20 May it please you, Ladies and Gentlemen.

21 Ladies and Gentlemen, on behalf of Erich
22 Spangenberg and TQP and the inventor, Michael Jones, I
23 want to thank you. It's been a long week and I see that
24 you have paid attention and you have done such a service
25 and we appreciate everything that you've done in this

1 case and your consideration.

2 Ladies and Gentlemen, Michael Jones is
3 not famous. He doesn't seek fame and fortune. He's a
4 humble inventor who worked hard to develop a new
5 technology to address problems that he recognized. And
6 when he did develop a new solution that he thought was
7 useful, he did what he was supposed to do. He described
8 it in a patent and filed it with the Patent Office and
9 told the world how to do it. And the Patent Office saw
10 fit to grant him a patent, as we've heard many times
11 throughout this trial, twice.

12 You've heard a lot about cryptography in
13 this case, more than I know -- that I suspect you've
14 ever wanted to. But at base, this case is about
15 Newegg's infringement of a constitutionally protected
16 property right, TQP's property right, and whether Newegg
17 should be held responsible for its actions.

18 Newegg has tried from the beginning to
19 misdirect you and distract you with things that its own
20 experts have admitted on the stand have nothing to do
21 with infringement.

22 Public key cryptography. This is a
23 symmetric key encryption. Modems, closed systems,
24 whether the -- whether the customer logs in. None of
25 those things are in the claims. And the Court has

1 instructed you this is all that matters. If they do
2 these things, they infringe.

3 So why did they spend so much time
4 talking about everything else except the claims?

5 Ladies and Gentlemen, let's direct our
6 attention to what's at issue here, and it's that
7 infringement.

8 They told you from the start that they
9 didn't know about the patent. They never heard of the
10 patent. They didn't intend to hear about the patent.

11 Well, you just heard the Judge instruct
12 you, doesn't matter. For direct infringement, all we
13 have to show right here, that they met these elements of
14 the claim.

15 They tried to avoid responsibility by
16 blaming their customers, saying they're not responsible
17 for the system that they admit that they own, that they
18 administer their own security, and they didn't bring a
19 single technical witness to tell you that their
20 technical system doesn't work.

21 Instead, they brought Mr. Cheng, who is a
22 very nice man, but admitted that he doesn't know
23 anything about the technology, didn't read the patent,
24 and couldn't tell you that they don't infringe. They
25 never brought Mr. Wu.

1 Ladies and Gentlemen, the truth of this
2 case is that Newegg infringed the '730 patent by setting
3 up its websites to require SSL and TLS, by setting up
4 its servers to select RC4. And the truth of this case
5 is that Newegg has failed to establish invalidity by
6 clear and convincing evidence because the RC4 algorithm
7 and the Notes with RC4 is undisputed that it was kept
8 secret.

9 Secret art is not prior art. Efforts to
10 commercialize, if done in secret, not prior art.

11 They've distracted you about whether it
12 was ready for patenting. We didn't waste your time with
13 that. The only question for you is whether they have
14 proven by clear and convincing evidence that RC4 and
15 Notes are prior art.

16 Can they prove -- have they proven to you
17 that they were not abandoned, suppressed, or concealed?
18 The evidence shows that it was suppressed, and it was
19 concealed. It's undisputed that RC4 was a trade secret,
20 and they didn't show you the on sale, as we'll get to.

21 First, let's go to infringement. Dr.
22 Jaeger showed you that -- demonstrated that their use of
23 SSL with TLS or -- and RC4 meets every one of the
24 elements of Claims 1, 6, 8, and 9.

25 Now, because of this claim covers steps

1 performed by the transmitter, Newegg's server, and its
2 customer's computer, we have to show you that they,
3 Newegg, directs or controls the customer's computer.
4 And we did that by showing you that Newegg selects SSL
5 and TLS and that it selects RC4.

6 Now, you heard some instructions about
7 intent with respect to inducement. We haven't talked a
8 lot about inducement in this case. Inducement requires
9 intent, direction, and control. Direct infringement, do
10 not. We do not have to show intent to show infringement
11 -- direct infringement by direct and control. All we
12 have to show is that they do direct and control these
13 steps.

14 Slide 5, please.

15 It's undisputed that every one of the
16 accused websites is an HTTPS website. They set it up
17 this way. It's only the secure sites of newegg.com and
18 neweggbusiness.com that are accused. By setting it up
19 this way, it's undisputed. Their experts agreed,
20 admitted, that it requires the use of SSL and TLS. And
21 we showed you that they direct and control because it's
22 the server that selects the cipher suite. Dr.
23 Stubblebine admitted it in his report. He tried to
24 equivocate. We'll get to that in a minute. And Dr.
25 Jaeger testified and showed you that it's the Newegg's

1 server that selects the server suite.

2 Slide 7, please.

3 You'll remember that we showed you that
4 with the -- with the Wireshark, that even though there
5 were 19 cipher suites submitted by the client, the
6 server selected No. 19. And once it selected it, Dr.
7 Stubblebine admitted -- next slide -- that after the
8 cipher suite is selected by the server, then each of the
9 remaining steps -- each of the steps of the claim occurs
10 without any further action by the customer; correct?

11 The customer doesn't have to click on
12 anything else, correct?

13 ANSWER: That's correct.

14 That's critical, Ladies and Gentlemen,
15 because what it means is once they select the server,
16 every one of these steps happens automatically without
17 any involvement by the customer. That is direction and
18 control. Once they select the server suite, this
19 happens. It just happens. They don't have to do
20 anything. The customer doesn't have to click anything.
21 They can't opt out of it. It just happens. And that's
22 direction and control.

23 Now, let's show how we --

24 Next slide, please.

25 So Dr. Jaeger explained using his slide

1 how every one of these elements is met, that the -- the
2 seed is provided to both sides, that the sequence is
3 generated at the pseudo-random generator here based
4 exclusively on the seed on the server write -- server
5 write key. Same thing happens over here and how the
6 keys are used.

7 And you'll remember that Dr. Stubblebine
8 on the stand admitted the same thing with his slide.

9 Next slide, please.

10 Remember, he admitted that they had a
11 pseudo-random number generator, that it was based on the
12 seed. The server write key at both sides. Same
13 sequence both sides; that a new sequence is used to
14 encrypt each block here and to decrypt each block here
15 (indicating). He admitted every one of those steps.

16 I submit to you that we proved our case
17 that their use of SSL and TLS with RC4 meets every one
18 of these elements.

19 So what is Newegg -- what's their
20 response?

21 They have two arguments. First, they say
22 that the generating of the sequence is not based
23 exclusively on the seed.

24 Next slide.

25 But Dr. -- thank you -- but Dr. Jaeger

1 testified very clearly, is the sequence of pseudo-random
2 key values based exclusively on the seed?

3 Yes, the key values are based on the
4 server write key. This value is the only value that is
5 used in producing the key values. Dr. Stubblebine
6 disputed that. But Dr. Diffie, their validity expert,
7 admits it. He admits that RC4 meets -- based
8 exclusively on because he said it invalidates it.

9 Does it invalidate because it's not prior
10 art, but there's no dispute from their expert, their
11 validity expert, that it's based exclusively on said
12 seed.

13 Now, their next argument -- next slide,
14 please.

15 This one was a timing one. He set up
16 this argument. This is -- this is from the language in
17 (1)(e), the generating at the receiver. And he set up
18 this argument saying that this can't happen until
19 it's -- the keys can't be produced until they have been
20 transmitted.

21 But, Ladies and Gentlemen, you know how
22 this claim is structured. You provide a seed to both
23 sides. (1)(c) talks about what happens at the
24 transmitter. You generate the first sequence here at
25 the transmitter. Each new key value being produced at

1 the transmitter to encrypt.

2 (1)(e) is what's happening at the
3 receiver. It's generating the second sequence of
4 pseudo-random key values at the receiver. It's
5 producing this key at the receiver. It's talking about
6 when this key is produced.

7 And Dr. Jaeger used this slide, and he
8 showed you how that element is met, and that when this
9 new key is produced, each time the predetermined number
10 comes across, it's used to decrypt as in (1)(f).

11 Slide 14.

12 Now, here's what they argued in opening
13 statement. Like anyone else that bias a NetScaler from
14 Citrix, Newegg doesn't know exactly how it works.

15 They tried to tell you that this
16 electronics company with 11 to 1200 employees doesn't
17 know how it works, yet they admit -- even Mr. Cheng
18 admitted, that they have control over the configuration
19 settings. They could have changed it, but they didn't.

20 And they never brought Mr. Wu to tell you
21 how it works.

22 The testimony in this case is that Mr. Wu
23 architected that site. He built their site. He
24 administers the security on that site. And you've got a
25 picture of him in your jury book, and they didn't bring

1 him here to tell you that they don't infringe and that
2 he couldn't change those settings.

3 Why? Because their expert admitted that
4 they could change those settings. They have control
5 over those settings. Ladies and Gentlemen, it's time
6 for them to take responsibility for their actions in
7 infringing TQP's patent.

8 That's Claim 1. We showed you with
9 respect to the dependent claims, Slide 17. We gave you
10 evidence and showed you that every one of these steps
11 were met, and this wasn't even disputed, so I'm not
12 going to waste -- spend your time on it.

13 Dr. Stubblebine admitted that every one
14 of these steps are met. If you find infringement of
15 Claim 1, you should find infringement of Claims 6, 8,
16 and 9 as well.

17 Ladies and Gentlemen, you're going to be
18 asked to fill in the verdict form, and when you do, we
19 ask you to write yes, that we met our burden of proving
20 by a preponderance of the evidence that each one of
21 these claims were infringed directly, because they
22 performed each one of these steps or directed it or
23 controlled the performance of these steps by setting up
24 their site to require SSL and by selecting that cipher
25 suite, which directed the computer to perform the rest

1 of these steps.

2 Their next excuse, Ladies and Gentlemen,
3 is validity. Validity they have to prove by clear and
4 convincing evidence. And they asked you to do that
5 based on Dr. Diffie's testimony. Dr. Diffie is a very
6 smart man, and he's contributed a lot to cryptography,
7 but he does not know patent law. He told you that.

8 What happened in this case is that
9 Newegg's lawyers took advantage of an inexperienced
10 expert. He auditioned for the role. He signed his name
11 to a report that these lawyers wrote, and he read the
12 script to you that they wrote.

13 But the problem, Ladies and Gentlemen, is
14 that they didn't tell him everything. They didn't give
15 him the right law. He told you he didn't understand the
16 concepts of anticipation, and he'd never gotten a clear
17 understanding of what abandoned, suppressed, or
18 concealed meant.

19 And I'll tell you that what he did
20 testify, the vague testimony that he gave, is
21 inconsistent with the Court's construction. And they
22 didn't give him all the facts. When they told him to
23 tell you about all the agreements that he has no
24 personal knowledge of or legal opinion about, they
25 didn't point him to the right provisions. They didn't

1 show him -- they didn't ask him to tell you and point
2 out the confidentiality provisions.

3 And they're going to try to tell you that
4 those confidentiality provisions are not relevant.
5 Maybe that's what they told Dr. Diffie. But it's
6 inconsistent with the Court's instructions, and I will
7 show you and you will see them, when you go back there.

8 Each of their theories for invalidity
9 requires that it was public, that it was not secret,
10 that it was not abandoned, suppressed, or concealed.
11 And if it was, they lose.

12 They cannot prove their invalidity case.

13 So let's look at Denning. First, he --
14 first, Dr. Diffie testified that he admitted it had to
15 be one system that has it all. He pointed you to
16 Pages 138 and 139. That's at the trial transcript at
17 Page 80.

18 But you heard from Dr. Rhyne today, who
19 does know patent law, that that book, this book right
20 here (indicating) does not describe a single system that
21 meets every one of the elements of this claim. It's
22 only by mixing and matching from different parts of this
23 book that he was able to pull this together.

24 And the -- the parts of the claims
25 that -- the parts of the book that he did point to,

1 Dr. Rhyne testified, don't give enough of a description
2 to allow one of ordinary skill in the art to make it, to
3 make this with every one of these elements.

4 And because of that, the Denning book is
5 not an anticipatory reference. And to the extent they
6 ask you, when they get up here to fill out obviousness
7 for anticipation -- for Dr. Denning's book, they did not
8 give you any evidence about obviousness. Dr. Diffie
9 didn't say a word about obviousness. And when you look
10 at the jury instruction that you just heard that lays
11 out all the evidence that they should have provided to
12 find obviousness, they didn't do a bit of that.

13 Next, the heart of this case is RC4. The
14 heart of their case is RC4 and Notes.

15 Slide 24, please.

16 The Court will instruct you that it has
17 to be -- in order to be prior art, secret use by a third
18 party is not public. An invention was in public use by
19 another, if the claimed invention was accessible to the
20 public or commercially exploited in a non-secret way.
21 Maybe this is what Dr. Diffie was trying to get at, that
22 it was being commercially exploited or commercialized,
23 but that requires that it was in a non-secret way. And
24 I showed you that black triangle where they had every
25 single leg of those triangles locked up with

1 confidentiality agreements as tight as they could be.

2 It was never commercially used or
3 commercially exploited in a non-secret way, until it was
4 first sold to the public in December 1999.

5 THE COURT: You've now used 18 minutes,
6 Counsel.

7 MR. FENSTER: Thank you, Your Honor.

8 Slide 25.

9 It's undisputed in this case, Ladies and
10 Gentlemen, that it can't really be disputed that RC4 was
11 kept as a trade secret. Dr. Rivest admitted it.

12 Dr. Stubblebine admitted it. Dr. Diffie
13 admitted it.

14 And that is the dispositive fact that
15 kills their case for invalidity, because if RC4 was
16 secret, it was not public. And if it was secret, it
17 can't be prior art under public use, under prior
18 invention. And the fact that it was kept secret, how
19 these steps were performed was never made available to
20 the public.

21 I'd like to show you the jury instruction
22 that you'll see. This is going to be at Page 18 of your
23 jury instruction, and this is what they have to show for
24 prior invention, that it was not abandoned, suppressed,
25 or concealed.

1 If it was abandoned, suppressed, or
2 concealed, it cannot invalidate the claims. An
3 invention was abandoned, suppressed, or concealed if the
4 other person, Dr. Rivest and Lotus and Iris, actively
5 concealed the invention from the public. We showed you
6 that they did.

7 Generally, an invention was not
8 abandoned, suppressed, or concealed if the invention was
9 made public, didn't happen; sold, didn't happen until
10 after; offered for sale, didn't happen until after; or
11 otherwise used for a commercial purpose.

12 We showed you that it was never
13 commercially performed. Nobody ever performed the
14 steps of this for money. I'll show you that in a
15 minute.

16 And the Court will instruct you a finding
17 of suppression or concealment is not negated merely
18 because the invention has been commercialized through a
19 secret use. If it was secret, it's not invalid, even if
20 it was for the purpose of developing Notes which would
21 later be sold to the public.

22 Slide 27.

23 This is what proves their case fails.
24 Every single one of these agreements was an effort to
25 conceal, to actively conceal, to keep it secret. Notes

1 never saw the light of day, until it was sold to the
2 public in December '89. And that means that they can't
3 prove any one of their defenses.

4 Slide 31, please.

5 Dr. Diffie admits that RC4 was never
6 publicly disclosed prior to 1994.

7 Now, Slide 33, please.

8 This is where Dr. Diffie admits that the
9 method was never performed for money. This is a method
10 claim, and to show that it was in public use, they have
11 to show that these steps were performed for money. And
12 he says: You're not aware of the method, the service
13 ever being offered for sale prior to either of the
14 relevant dates?

15 ANSWER: I'm not aware of anything but
16 the products being offered for sale.

17 And this you know is December 1989, which
18 was too late.

19 Ladies and Gentlemen, they -- they tried
20 to show you an offer for sale. They'll point to two
21 things. One, the license agreement between Lotus and
22 RSA. The Court will instruct you that if it's a
23 license, it's not a sale. And this is DX 17 at Page 5.

24 It says it's a license of software, and
25 it says that RSA retains the right title and interest to

1 RC4. It was never a sale. It was only a license. And
2 under the Court's instructions, a license is not a sale.

3 The next thing that they'll point to is
4 the software development agreement with Iris. And that
5 sale was not -- that development agreement was a
6 co-development agreement. It was not a sale. It
7 specifically provides that they would jointly own the
8 product. They were jointly develop -- developing
9 something, co-developing it so that they could sell
10 Notes to the public later, after the critical date.
11 And, of course, it was locked up by a confidentiality
12 agreement all along.

13 Slide 35, please.

14 Ladies and Gentlemen, I submit to you
15 that when you go back and deliberate and ask yourselves
16 whether they proved that this patent was invalid by
17 clear and convincing evidence, applying the Court's
18 instructions, that they haven't done so.

19 And we ask you to fill out no to each of
20 the questions regarding validity, because they haven't
21 proved their case by clear and convincing evidence.

22 Now, quickly, let's go to damages.

23 Slide 36.

24 Dr. Becker talks to you about damages.

25 Slide 37.

1 He testified about the extent of their
2 use. He testified to you about the basis for his
3 calculation of a reasonable royalty.

4 Slide 39, please.

5 And he showed you his calculations. He
6 laid it out. And, Ladies and Gentlemen, when you get to
7 the verdict, Slide 40, we ask you to write in \$5.1
8 million. You've heard no contrary evidence in this
9 case.

10 I look forward to talking with you again
11 after Newegg gets their chance. Thank you.

12 THE COURT: All right. The Defendant may
13 now present its final closing argument to the jury.

14 MR. BALDAUF: Hello, everybody. Excuse
15 me.

16 I told you at the beginning of last week
17 that TQP was trying to stretch its patent to cover
18 technology that Mr. Jones just did not invent. And
19 that's exactly what you have seen here.

20 Mr. Jones did not invent SSL. He did not
21 invent RC4. And the patent does not cover that
22 combination.

23 And in addition, you have learned that
24 someone else invented RC4 before he invented that
25 patent, and you've learned that someone else has

1 invented RC4 and Lotus Notes before that patent.

2 Now, you've learned a little bit about
3 the parties during the course of last week. You've
4 learned that TQP is in the business of suing.

5 Mr. Spangenberg, he sues companies and
6 demands a license for his patents. He then settles
7 these cases for an amount that's less than what it would
8 cost these companies to defend themselves.

9 But Newegg didn't want to do that.
10 Newegg just didn't want to settle because it was
11 cheaper. Newegg wanted to prove that this patent was
12 invalid, and Newegg wanted to prove to you that this
13 patent was not infringed. And that's what we have done.

14 We've shown you three different reasons
15 why this patent is invalid and many different reasons
16 why there can be no infringement.

17 Now, the first witness we heard was
18 Mr. Jones, and he explained to you how his patent
19 worked. What he told you was that this was a closed
20 system where the keys had to be supplied to both the
21 transmitter and the receiver before there could be any
22 communication.

23 And he also told you that there would be
24 a number that would be given to these block counters,
25 and what they would do is that they would count the

1 number of blocks that would go from the encryptor to the
2 decryptor. So let's say that number is three. There
3 would be three blocks -- one, two, three -- and then
4 that block counter would count those and then it would
5 switch the key.

6 Now, when I first read this patent, I
7 thought to myself, if there's an invention at all -- at
8 all here, it has to do with that block counter because
9 that seems to be the only thing that seems to be a
10 little different.

11 Let's look at the claim, please.

12 Now, if we look at the claim, TQP has
13 been telling you all week that there's nothing in this
14 claim that says block counter. However, this is a
15 method claim, and the function of that block counter is
16 throughout here. A time dependent on the predetermined
17 characteristic, each time a predetermined number of said
18 blocks are transmitted over the link.

19 What are those predetermined
20 characteristics? What are those blocks?

21 That's the function of that block
22 counter. It's counting the blocks.

23 Now, you notice what TQP did to the block
24 counter. This the first slide that you saw from Dr.
25 Jaeger. There's the block counter in both of them.

1 It's clearly part of the mechanism on
2 both ends, but I want to get this right. Dr. Jaeger
3 said, well, we don't need that because it's not a
4 requirement of the claims that we're looking at, so
5 we'll just use this somewhat simpler figure. And there
6 we go. It just gets rid of the block counter
7 altogether.

8 How can he do that? How can he just get
9 rid of part of the patent? Well, he had to do this to
10 try to convince you that there was infringement because
11 today's systems just don't work like this.

12 In today's systems, the keys change every
13 time a block is encrypted, so there's no reason for a
14 block counter. There's nothing to count. And then when
15 he told you -- he said, well, we're just going to assume
16 that this predetermined number is always going to be one
17 block. So essentially he did that to wipe the block
18 counter out of the patent and out of the claims.

19 So if we look back at Figure 1 of the
20 patent without the block counter, that's what it looks
21 like. But by doing that, in making that decision to
22 read out the block counter to try to prove infringement,
23 this patent is unquestionably invalid.

24 Dr. Diffie, he told you a lot about a
25 book that his friend Dorothy Denning wrote, a textbook.

1 And this was written in 1982, seven years before this
2 patent.

3 The evidence shows that this one figure
4 alone, Figure 3.3, as Dr. Diffie explains, meets every
5 limitation of Claim 1.

6 Now, Mr. Fenster just told you that Dr.
7 Diffie was looking at all sorts of different figures and
8 different systems. No. 1, that's not true. He was
9 talking to you only about this system with respect to
10 Claim 1.

11 And No. 2, he's just wrong on the law.
12 You heard what the Judge told you. To anticipate, it
13 only has to be with one -- within one single reference
14 and that book is one single reference. It's irrelevant
15 if you're looking at different systems within it.

16 Now, Dr. Diffie explained to you in
17 detail that the evidence shows that this figure alone
18 anticipates Claim 1 of the patent. If we look at this
19 together, the Denning textbook and the figure of the
20 patent with the block counter removed, you can see that
21 they're the same thing. We've got here the transmitter,
22 here the transmitter, receiver, receiver, transmission
23 link, transmission link. And in both of these, you get
24 the stream of pseudo-random key values there and there,
25 there, there, and then you've got the encryptor,

1 encryptor, decryptor, decryptor.

2 The only thing -- the only thing at all
3 that Dr. Rhyne told you was different that would make
4 this a patent, have only one thing, he said, that's
5 different than what's in Denning was this idea of based
6 exclusively on the seed value. He's trying to convince
7 you that right here that IO, that that is not being
8 based exclusively on the seed value.

9 Please go back and look at what Dr.
10 Diffie told you, specifically -- it's Page 138 of the
11 Denning book where it says specifically that the key
12 generator is initiated by a seed, IO. Dr. Rhyne went on
13 to talk about all these different things that are in the
14 Denning book. Dr. Diffie himself, he didn't rely upon
15 any of that. It's only this thing, the IO. It's solely
16 the seed value.

17 The evidence plainly shows that when they
18 made the decision to read this block counter out of
19 their patent, that it's invalid and the Denning book
20 satisfies every single claim limitation.

21 Now, Dr. Diffie also talked to you a
22 little bit about the dependent claims. These dependent
23 claims really don't add much of significance. 6 and 8,
24 they only add the idea that you can do this at remote
25 locations, multiple receivers. That's clearly in the

1 Denning book.

2 Claim 9 adds this concept of error
3 control. That's in the Denning book, as well.

4 Dr. Diffie explained to you that the
5 evidence is clear and convincing, the patent is invalid
6 over Denning alone.

7 Now, let's turn now to RC4 and Lotus
8 Notes. The Judge has instructed you about many ways
9 that we submit that RC4 alone and RC4 in Lotus Notes
10 invalidate the patent. Prior invention, prior use,
11 prior sale. I don't have a lot of time here, so I'm
12 only going to talk to you about prior invention, but the
13 RC4 and Lotus Notes story encompasses all of those
14 facts.

15 Before I get to those facts, I'd like to
16 talk about this one issue that TQP keeps throwing out
17 there, and that's this idea that this invention was
18 somehow abandoned, suppressed, or concealed, or it was a
19 trade secret.

20 Ladies and Gentlemen, this argument is
21 nothing more than smoke and mirrors that's intended to
22 confuse you. The Judge read to you the law on this
23 point, and he told you -- and you can verify this on
24 Page 18 of the jury instructions -- that he would tell
25 you and did tell you that an invention is not abandoned,

1 suppressed, or concealed if -- if it is used for a
2 commercial purpose.

3 Think about this, Ladies and Gentlemen,
4 every bit of evidence that you have heard has been that
5 RC4 has been used for a commercial purpose. From the
6 day that Dr. Rivest invented it until today, we're --
7 we're using it today, and that's what they accuse of
8 infringement. I don't see how they can say that it has
9 not been used for commercial purpose. That's all it's
10 ever been used for.

11 And this idea about whether the RC4 code
12 is a trade secret is really -- it's just silly. Think
13 about this for a second. If we had to show you the RC4
14 code to prove to you that the patent was invalid, that
15 the claims needed that, they would have to show you that
16 RC4 code itself to prove infringement.

17 How much RC4 code did they show you
18 that's on the Newegg system? It's a big fat zero. You
19 didn't see any of it. It's not in the claims, and it's
20 not required.

21 Likewise, whether the RC4 code itself was
22 provided to the public is completely irrelevant. On
23 Page 15 of the jury instructions, the Court's instructed
24 you that as long as the use of Notes and RC4 was public,
25 access to the inner workings is not required. And

1 that's the law.

2 So this whole triangle of
3 confidentiality, this is completely irrelevant. What
4 they're telling you is there are these agreements
5 between Iris, between RSA and Lotus, and they were bound
6 by confidentiality. They were bound by confidentiality
7 to not disclose the source code to anyone. And that
8 just simply doesn't matter.

9 And one final point on that is whether
10 there were secrecy agreements or not has absolutely
11 nothing to do with whether or not there was a prior
12 sale. It's not an issue.

13 Now, with respect to -- if we could turn
14 that. This is how Dr. Jaeger applied RC4 and SSL to the
15 claim. He said RC4 gives us every limitation except the
16 top two. And that's the transmitter and the receiver
17 that's providing the seed.

18 You heard Dr. Rhyne this morning, though,
19 say that those are absolutely provided by Lotus Notes.
20 So once Lotus Notes is combined with RC4, Dr. Rhyne
21 admitted to you that they satisfy every limitation of
22 every claim, and all he's arguing about are the dates.

23 However, RC4 alone satisfies everything
24 but the transmitter and the receiver and the seed. Dr.
25 Diffie explained to you that that's inherent or at least

1 obvious because anyone skilled in the art with RC4 would
2 understand that to use it, you needed a transmitter and
3 a receiver and a seed. Otherwise, it's worthless, and
4 that's the only intended purpose for RC4.

5 So the only relevant issue that they're
6 arguing is whether or not we can prove to you that RC4
7 was invented before October of 1989 and whether RC4 and
8 Lotus Notes was invented before that same day. You've
9 heard a lot about those dates, and you've seen a lot of
10 evidence corroborating those dates.

11 In fact, you've heard nothing to dispute
12 the fact that RC4 was invented, completely finished, and
13 operable no later than the spring of 1988 and that the
14 patent wasn't filed until almost a year and a half
15 later. Ladies and Gentlemen, these dates are clear and
16 they are convincing.

17 You've heard from these three gentlemen
18 who talked to you about it. They told you what they
19 invented and why. These guys have no reason to lie.
20 They don't have a dog in this fight. They have no
21 interest but to tell you the truth. In fact, Mr.
22 Eldridge flew all the way down here from New Hampshire
23 to talk to you in person, to tell you what really
24 happened.

25 Now, Dr. Rivest, his evidence is

1 uncontradicted. He told you that he invented RC4, 1987,
2 but certainly no later than 1988.

3 Next, you heard from Mr. Eldridge.
4 Mr. Eldridge told you that it was delivered by
5 Dr. Rivest to him in December of '87 or January of '88.

6 Mr. Eldridge then told you that he
7 himself wrote the code and incorporated RC4 into Lotus
8 Notes no later than February 22nd, 1988. He even showed
9 you the code he himself wrote to do this. And, in fact,
10 confirmed that date that RC4 was operable in the Lotus
11 Notes product no later than February 22nd, 1988.

12 Could you flip it, please?

13 So here's a timeline for you. We've just
14 shown you and the evidence has shown you that the
15 invention of Lotus Notes and -- with RC4 and the
16 invention of RC4 were unquestionably long before this
17 patent. And from this point on, every fact does nothing
18 but confirm that the Notes product was being used --
19 publicly used and was the subject of ongoing
20 commercialization efforts.

21 You saw a letter that was written by
22 Dr. Rivest to Lou Giles at the NSA dated April 4th,
23 1988, and he told you that this letter was accompanied
24 with the RC4 code, and the evidence was undisputed that
25 he sent this to the NSA to get export approval so they

1 could start commercializing the RC4 code.

2 You heard a lot from these two gentlemen.
3 They explained to you exactly what they were doing to
4 try to commercialize the Lotus Notes product with RC4.
5 You heard them tell you that they were using it long
6 before the '730 patent was filed.

7 Mr. Eldridge told you about beta-testing
8 the Notes product in 1988 with Lotus' customers to
9 commercialize the product. Mr. Ozzie told you that he
10 passed out copies of Notes with RC4 in 1988 to potential
11 customers so they could try it with no confidentiality
12 obligation whatsoever.

13 They both told you that they themselves
14 were using the Notes product to communicate with people
15 at Lotus as of 1988. And you heard both -- you heard
16 both of these gentlemen tell you that they personally
17 disclosed the product with RC4 in it to people at
18 Microsoft with no confidentiality obligation.

19 Mr. Ozzie told you that he demonstrated
20 it to Bill Gates himself in a hotel room in 1988. Now,
21 he said the RC4 function was turned off, but so what.
22 It was still in there.

23 Mr. Eldridge told you that he gave a copy
24 of Lotus Notes with RC4 to a Darryl Rubin from Microsoft
25 with no restrictions whatsoever. And we even had a

1 letter coming back from Mr. Rubin dated April 28th,
2 1988, that discloses this and talks about his use of the
3 Lotus Notes and RC4 in this product.

4 Now, you also saw a number of
5 agreements -- probably too many to go through here --
6 but you saw the agreements whereby the Lotus Notes
7 product was being developed specifically by Iris to be
8 sold to Lotus. And that was in 1988.

9 And Mr. Eldridge told you that he, in
10 fact, did make that delivery and they sold the RC4
11 product with Lotus Notes to Lotus. Again, it doesn't
12 matter if it's secret or anyone knows anyone -- anything
13 about that. That product was sold as of that date.

14 Now, I think the evidence is certainly
15 undisputed, clear and convincing that RC4/Lotus Notes
16 certainly invented, developed, commercialized long
17 before the patent.

18 So what do we hear?

19 We hear a lot about the re-examination,
20 and because it's been re-examined, that means this
21 patent is valid.

22 You heard from Dr. Rhyne this morning,
23 and he himself told you that the Patent Office can only
24 consider patents and printed publications. They cannot
25 consider any of the information you've heard here. They

1 can't answer prior sale, prior invention or prior use.
2 And they can't consider any of the testimony of any of
3 these witnesses.

4 Ladies and Gentlemen, the Patent Office
5 was the final decision-maker in this. Why would we be
6 here with you? The jury system exists for you to make
7 this decision.

8 I'd like to turn to infringement now. As
9 the Court explained to you, for infringement to exist,
10 TQP must prove that every single claim limitation is
11 satisfied by Newegg. 99 percent isn't good enough. It
12 has to be all or nothing.

13 We've shown you many different reasons
14 through the last week why there can be no infringement.
15 I'd like to start with this one, part (1)(e), the
16 highlighted portion, it's a mouthful, but it's a new one
17 of said key values.

18 The Court has construed this for us.
19 Here's what the Court said: That this means a new key
20 value in the first and second sequence as used each time
21 a predetermined number of blocks have been sent from the
22 transmitter over the communication link.

23 There's a real easy reason in here why
24 there can't be infringement. Look at this sentence. It
25 says -- where did it go -- each time a predetermined

1 number of blocks, plural. What are they accusing of
2 infringement?

3 A single block. This says blocks,
4 plural. They aren't even accusing a single block. For
5 that reason alone, infringement can't exist.

6 And in addition to this, the Newegg
7 system doesn't work this way. And you don't have to
8 take my word for this. Their own expert told you.

9 We spent a lot of time on this one. I
10 asked him in his demonstrative: So block 2, the blue
11 block, is being encrypted using a new key value before
12 block 1 has been transmitted across the communication
13 link, correct?

14 And he said: That's correct.

15 Look at this limitation. Counsel tried
16 to tell you that this only applies on the receiver end.
17 That's absolutely not true. Look at the construction.
18 It says a new key value in the first and second
19 sequence. The first sequence comes from the
20 transmitter.

21 And what does it say?

22 It says that a new key value can only be
23 used when the prior block has already been transmitted
24 across the link, which is shown in the little red
25 circle. So for infringement to exist, that blue block,

1 No. 2, cannot be encrypted with a new key value until
2 the prior block, the green one, has been transmitted
3 over the link.

4 Their own expert shows you -- has shown
5 you that this limitation is not satisfied. And
6 infringement cannot exist for this reason alone.
7 Nobody's doing this.

8 We asked Dr. Stubblebine about this,
9 same -- he concluded -- he said what Dr. Jaeger was
10 accusing as a predetermined number is one block. And so
11 one block has got to be sent before you use the next key
12 to encrypt the next block, and that's not what's going
13 on.

14 He showed you his own demonstrative. But
15 what does this show you?

16 It shows you that new keys are
17 continuously being used to encrypt blocks of data, and
18 they're all being sent together all at once across the
19 link. They're not -- this does not satisfy the
20 limitation of a new key value only being used once the
21 previous one has been sent across the communications
22 link. So infringement is avoided for this reason alone.

23 Now, the second thing I'd like to talk to
24 you about is this same limitation of based exclusively
25 on the seed value. We asked Dr. Stubblebine about this

1 and we asked him, is this satisfied? Did Dr. Jaeger
2 prove this?

3 And he said, well, no, he didn't because
4 he didn't look. He said the only way you could find out
5 if this was satisfied or not was to get down to the chip
6 layer of the NetScaler to find out exactly what was --
7 what was happening, and Dr. Jaeger never did that.

8 Instead, he relied upon open SSL code
9 that he could not confirm was even being used on the
10 Newegg system. So as a backup plan, he shows you some
11 testimony from Dr. Rivest that says: Is there an input
12 to the RC4 setup algorithm?

13 Yes.

14 And he said: Would it be fair to call
15 that a seed value?

16 Okay. Great. That -- that in no way
17 says that the key values are exclusively based on the
18 seed value. We then showed you the rest of Dr. Rivest's
19 testimony and he told you that, in fact, there are three
20 inputs to the key generation step. So it's not based
21 exclusively on the seed value. Infringement is avoided
22 for this reason as well.

23 Now, the remaining bases of
24 non-infringement deal with this issue of control or
25 direct. As they've told you, they contend that a number

1 of these steps are being satisfied, if at all, by the
2 customer. They're asserting that Newegg controls or
3 directs its customers to do this.

4 We've heard the Judge tell you in his
5 instruction is that arm's length cooperation is not
6 enough for control or direct.

7 With respect to this 1(b) limitation,
8 providing a seed value, how did Dr. Jaeger say that that
9 was satisfied? He said that's from the SSL handshake,
10 and that that is initiated when the customer initiates
11 the SSL handshake by clicking on the encrypted link. He
12 said that's what does it.

13 So for Newegg to be controlling or
14 directing that step, you would have to believe that
15 Newegg somehow can control its customer's computers to
16 click on an encrypted link to start that process.

17 Ladies and Gentlemen, that just isn't
18 possible. At most, there's arm's length cooperation to
19 make this happen, but there's nothing Newegg can do to
20 control or direct its customers' computers to initiate
21 this process.

22 Now, the remaining steps at the end, the
23 decrypting, we've talked a lot -- all week about this,
24 about RC4 and where it comes from. I don't want to
25 belabor this point, but I think the evidence is very

1 clear that RC4 cannot be used at all unless it first
2 comes over in the cipher list from the customer.

3 And, again, there's nothing that Newegg
4 can do to direct or control its customers' computers to
5 send over RC4 and its cipher list. Again, at best, this
6 is an arm's length negotiation. Infringement is avoided
7 for all of these reasons.

8 Now, you didn't hear really anything
9 about inducement during the course of this week. You're
10 hearing about it for the first time now. But for
11 inducement, there has to be underlying infringement.
12 All the claim limitations have to be satisfied by
13 somebody. They also have to prove to you that Newegg
14 knew of the patent and Newegg had an intent that it be
15 infringed.

16 Ladies and Gentlemen, there's absolutely
17 no evidence of any of that. There cannot be inducement.

18 Now, we've already established for you
19 that the patent is invalid and it's not infringed. So
20 what did we hear about? Oh, we heard, oh, well, Mr. Wu
21 wasn't here. Well, if Mr. Wu was so important after
22 already hearing from Mr. Chong, they could have called
23 him them self. Mr. Chong told you everything you needed
24 to know about the Newegg technology.

25 So what else did they tell you? What did

1 they tell you, well, 125 people have licensed the '730
2 patent, and that's got to mean something. And they
3 throw out some big names here. I think that's supposed
4 to get your attention.

5 For example, Target. Do you see Target
6 on there? You can look up Target and what they paid in
7 Plaintiff's Exhibit 42 and Plaintiff's Exhibit 43, and
8 you will find that Target paid a grand total of \$40,000
9 to settle this lawsuit against TQP.

10 So let's say you're in charge of
11 litigation at Target. Mr. Spangenberg sues you and
12 you're faced with a possibility of spending two, three
13 million dollars to defend yourself or paying \$40,000 to
14 get rid of the case. What would you do? I think most
15 people would just decide to settle. And I can't imagine
16 Target in any way thinks that they infringe or that the
17 patent is valid because of that.

18 This is irrelevant. It doesn't mean a
19 thing. And, in fact, the Court has instructed you on
20 Page 10 that the fact of these licenses in no way means
21 that Newegg has infringed. Their own damage expert, he
22 agreed. He told you that these licenses were irrelevant
23 and he couldn't get away from them fast enough to try to
24 embrace these unrelated RSA licenses to try to jack this
25 number up somehow to \$5 million. He said that the

1 \$500,000 paid by Amazon, Newegg's most direct
2 competitor, was irrelevant because they just settled to
3 get out of litigation, that that in no way meant that
4 Amazon thought this patent was invalid or infringed.

5 Mr. Spangenberg told you that he's filed
6 over 800 lawsuits without contacting the Plaintiff
7 first. And in every one of the licenses that we've
8 heard about in this case, the settlements -- the
9 licenses were a result of those companies being sued
10 first or their customers being sued and that company
11 settling for less than it would cost to fight.

12 Again, you've heard that it cost anywhere
13 from two to three million dollars to defend one of these
14 cases, and even if you win, you don't get your money
15 back. There's no mechanism where a Defendant
16 automatically gets their money back. So when Amazon,
17 Target, the rest of those companies took those licenses
18 for far less than it would have cost them to fight, I
19 think you can figure out why they settled. Newegg just
20 wasn't interested in doing the same thing.

21 Now, when I first addressed you on
22 Tuesday, I asked you to read the patent. Read it and
23 see if there's any mention of SSL, any mention of RC4,
24 any mention of the Internet, any mention of encrypting
25 credit cards. If you read it, you'll see that none of

1 that is in there. And that's because it was not
2 invented by Mr. Jones. I think he probably has a fine
3 invention, but it involves the use of this block
4 counter. He did not invent SSL, and he did not invent
5 its use with RC4. And that's not what this patent
6 covers.

7 We brought you the man that actually did
8 invent these inventions, Dr. Whitfield Diffie, who's
9 breakthrough public key cryptography invention is what
10 enabled the use of SSL today. And they're saying public
11 key cryptography has nothing to do with this patent, but
12 yet they still point to the SSL handshake as forming
13 part of their infringement claim.

14 Dr. Rivest, unquestionably the inventor
15 of RC4.

16 Doctor -- I'm sorry, Mr. Eldridge and Mr.
17 Ozzie, the two gentlemen who in the first instance used
18 RC4 and used it in the Lotus Notes product which is
19 certainly one of the most famous software products of
20 all time.

21 THE COURT: You have five minutes
22 remaining, Counsel.

23 MR. BALDAUF: Thank you, Your Honor.

24 These men came here to tell you the
25 facts, the facts about what they did in the 1980s. I

1 believe we've -- what we've talked about is very clear.

2 With respect to RC4, with respect to RC4
3 and Lotus Notes, TQP admits that if we can prove those
4 dates, that they were earlier, that all the claims are
5 invalid.

6 As I mentioned before, please read the
7 jury instructions closely. This trade secret idea, it's
8 nothing but a red herring. The jury instructions
9 explain that if RC4 was the product of commercialization
10 and that the -- if the public was getting the benefit of
11 the use of the invention, it does not matter if the RC4
12 code was kept as a trade secret. Please read the jury
13 instructions. It explains it very, very clearly.

14 On infringement, we just went through a
15 number of different reasons why there can be no
16 infringement, but a couple of them are really, really
17 simple. They have been sent. Their expert's own
18 demonstrative shows that that is not satisfied by
19 anybody. I think that one is very, very clear.

20 And with respect to this idea of who
21 performs the steps and whether Newegg is controlling or
22 directing, as Mr. Fenster is trying to imply, this is
23 not a cop out. Newegg is not blaming its customers.
24 It's the law. And you're required to apply the law as
25 provided by the Court.

1 And the Court has told you that mere
2 arm's length cooperation is not direction and control.
3 And that's all they can point to. As you've seen, for
4 the SSL handshake to happen and the seed to be provided,
5 it's the customer's computer that has to initiate that
6 transaction by clicking on a secured link. And there's
7 not a thing in the world that Newegg can do to control
8 or direct its customers to do that.

9 Ladies and Gentlemen, TQP is asking for
10 millions of dollars for the alleged infringement based
11 upon the use of SSL and RC4. But that doesn't appear
12 anywhere in this patent. And there's absolutely no
13 evidence that the patent covers that stuff.

14 THE COURT: Two minutes, Counsel.

15 MR. BALDAUF: Thank you.

16 So there's no infringement. And beyond
17 that, we've shown to you that what they say is covered
18 by the patent -- namely RC4 was invented by Dr. Rivest
19 almost two years before this patent and it's never been
20 abandoned, suppressed, or concealed. It's been the
21 basis of ongoing commercialization efforts from the day
22 it was invented, and it's still being used today.

23 Likewise, Lotus Notes, that product, it
24 was at least -- at the very least given to Microsoft,
25 and Mr. Ozzie told you that he distributed copies to

1 various customers without -- without any confidentiality
2 obligation whatsoever, and those gentlemen were, in
3 fact, using it in 1988 with Lotus. And the evidence is
4 clear that there was also a sale.

5 Look at the jury instructions. They're
6 trying to tell you a license is not a sale. That
7 doesn't apply to software. Please read the
8 instructions. There, in fact, was a sale of this
9 product in 1988 from Iris to Lotus.

10 Ladies and gentlemen, thank you so much
11 on behalf of everyone associated with Newegg for your
12 attention over the last week. We know this is a
13 sacrifice, especially this time of year. But your
14 service is vital. It's so important to the American
15 justice system. So we ask that when you go back to
16 deliberate, you find, as the evidence has shown, that
17 this patent is not infringed by Newegg in any way and
18 that the claims are invalid.

19 Thank you.

20 THE COURT: All right. The Plaintiff may
21 present their final closing argument. You have 11
22 minutes remaining, Mr. Fenster.

23 MR. FENSTER: Thank you.

24 57, please.

25 Ladies and Gentlemen, the misdirection

1 continues. They started, they ended talking about
2 whether or not Mr. Jones invented SSL and RC4. But Dr.
3 Stubblebine had to admit on that stand on cross-
4 examination whether or not Mr. Jones invented RC4 or SSL
5 is completely irrelevant to infringement, correct?

6 I agree.

7 Why are they talking about this? Because
8 they don't want to talk about the claims. He came up
9 here and talked about counters and blocks, block
10 counters and closed systems and Figure 1. And the
11 Judge -- and they said why are -- why did we get rid of
12 the block counter because the Judge told you -- is going
13 to tell you and has told you it's the claims that
14 control. Dr. Stubblebine admitted there is no block
15 counter. There is no closed system. We're talking
16 about the claims.

17 The -- until the very last second it
18 sounded like they were only talking about prior
19 invention and gave up on public use, gave up on
20 public -- on sale. Public -- prior invention requires
21 that they not abandon, suppress, or conceal. This is
22 the instruction that I showed you before, and it's going
23 to be at Page 18 of the copy that you get.

24 They said that the agreements of
25 confidentiality are irrelevant, that all they have to

1 show is that it existed before. No. They have to show
2 that it existed before and that it was not abandoned,
3 suppressed, or concealed. If it was any of those
4 things, if it was suppressed, if it was concealed, not
5 prior art.

6 He put up that black chart and stamped
7 irrelevant over my nice chart. It's not. The -- the
8 Court's construction -- instruction talks about if it
9 was concealed, if it was actively concealed, if it was
10 secret use. The Court's instruction tells you that
11 those things are directly irrelevant, and they're asking
12 you only to ignore it.

13 On infringement, he tried to tell you
14 that there was not a predetermined number of blocks
15 because the predetermined number was 1. That's the
16 first that I've heard one is not a number. It's a
17 predetermined number of blocks. It doesn't say multiple
18 blocks. It says a predetermined number of blocks, and
19 there's no -- I don't think anyone can really dispute
20 that one is a number.

21 So here's what they said on infringement.

22 Slide 42, please.

23 So first they talked about based --
24 second, they talked about based exclusively on and they
25 showed you a slide from Dr. Rivest who said that they're

1 inputs. Dr. Rivest never said that the sequence of keys
2 is generated based on those inputs. The only testimony
3 from Dr. Rivest is the one that we showed you, and Dr.
4 Stubblebine -- Stubblebine admitted he didn't show you,
5 which is this, that the key sequence is generated from
6 the seed and only from the seed, consistent with what
7 Dr. Jaeger told and you Dr. Diffie told you.

8 Now, let's go to Slide 43 and go to their
9 timing issue.

10 Dr. Stubblebine's construction and
11 Newegg's argument apparently is that the second -- is
12 that this language in 1(e) that's talking about what
13 happens at the receiver somehow dictates the timing of
14 the key in the transmitter. According to their
15 understanding, what they're trying to tell you is that
16 the key up here can't be used -- used until the block
17 has already been transmitted.

18 If the block's been transmitted, that key
19 can't be used for encrypting and this preamble is all
20 about transmitting a sequence of blocks in encrypted
21 form. It's no wonder that Dr. Stubblebine reaches the
22 conclusion that this claim is impossible to infringe
23 under his nonsensical interpretation. It's because it
24 doesn't make any sense. This element, this structure of
25 the claim is so logical. This is what happens at the

1 transmitter. This is encrypting at the transmitter.

2 This is what happens at the receiver. And this is

3 decrypting.

4 The new -- it says -- it does say a new

5 one -- here, I'll do it here -- a new key value in the

6 first and second sequence is used each time a

7 predetermined number of blocks have been sent from the

8 transmitter. Why? Because this language says the first

9 sequence of keys and the second sequence of keys are

10 identical to one another.

11 So this second key that's used at the --

12 at the receiver does appear in the first sequence. It

13 was the one that was used to encrypt that block of data.

14 And they have to match because it's a symmetric key

15 encryption system, and that's why their system is met.

16 That's why they infringe. That's why Dr. Stubblebine's

17 non-infringement argument doesn't work.

18 Let's go back to Microsoft real quick.

19 They talked about RC4, and they said that there was a

20 non -- that despite their non-disclosure agreements and

21 on all the confidentiality, that nonetheless it was

22 disclosed to Microsoft.

23 THE COURT: Five minutes, counsel.

24 MR. FENSTER: Thank you, Your Honor.

25 Let's hit that real quick.

1 Slide 29.

2 This is Mr. Eldridge admitting that --
3 that how RC4 functioned was never disclosed. The way in
4 which RC4 functioned, I might not have even been aware
5 of at the time, and I didn't go into detail with that
6 with Microsoft.

7 And then they talked about the Lotus
8 Week.

9 And let's go to Slide 30.

10 This is what Mr. Ozzie said about whether
11 or not it was disclosed -- it was displayed -- demoed at
12 Lotus Week. I almost certainly did not demonstrate it.
13 And then Dr. Bal -- or Mr. Baldauf said, yeah, it was
14 turned off, but so what? So what? So what means it
15 wasn't demonstrated. This is a method claim and if it
16 was turned off, these steps were not demonstrated. They
17 did not demonstrate the steps of this claim. And
18 because of that, there was never a public disclosure.

19 Instead, it was suppressed and concealed.

20 Ladies and Gentlemen, there is no dispute
21 that RC4 -- how it functioned was always kept as a trade
22 secret.

23 Slide 49, please.

24 Dr. Diffie, we saw, had a similar
25 situation. Remember Dr. Diffie's patent? He disclosed

1 his in 1976, and it turned out that someone had done it
2 before, Mr. Ellis, but he kept it secret. And so Dr.
3 Diffie's patent was valid. It was valid until the day
4 it expired. And the reason is because our patent system
5 rewards disclosure, and Dr. Diffie did what he was
6 supposed to do. He disclosed it. Just like Michael
7 Jones did. And just like Dr. Diffie's patent was valid
8 even though there was secret prior art, Mr. Jones's
9 patent is valid even though RC4 was secret.

10 Next slide -- can you take that down,
11 please?

12 Let's talk real quick about damages.
13 There was no contrary evidence to rebut Dr. Becker's
14 analysis. He explained why the settlement agreements
15 shouldn't -- shouldn't be considered as a basis for the
16 reasonable royalty. He's not running away from them.
17 He's applying the law as the Judge will instruct you,
18 based on the hypothetical negotiation. And he explained
19 why those are different.

20 I didn't come up here and tell you that
21 those licenses proved that they infringe. We prove that
22 they infringe because Dr. Jaeger showed you how they do
23 based on their testimony, based on their documents. The
24 licenses just showed that other people respect that
25 patent.

1 And one of those licensees was IBM. And
2 you know who IBM is? IBM is the one that bought Lotus.

3 THE COURT: Two minutes, counsel.

4 MR. FENSTER: Thank you, Your Honor.

5 And if IBM was the one that bought Lotus,
6 they would have all this prior art. They knew about
7 Lotus Notes. They knew about Dr. -- Mr. Ozzie, they
8 knew about Mr. Eldridge. They didn't come into Court
9 saying that it was invalid. They took a license.

10 It is time, Ladies and Gentlemen, for
11 Newegg to take responsibility for its actions. It is
12 the one that selects the cipher. It is the one that
13 administers its own security, and they are the ones who
14 refuse to change it even after they knew about the
15 patent.

16 Mr. Spangenberg has a valid,
17 constitutionally protected property right. It's being
18 infringed. I think we've shown that. And because it
19 is, the law requires that if you do find infringement
20 and you do find that it was not valid, that you grant a
21 reasonable royalty for their infringement.

22 You heard Mr. Spangenberg tell you we
23 tried to reach out. They reached out to TQP no than --
24 no less than 15 times -- T -- to Newegg. Newegg never
25 responded. Once they found out about this patent, they

1 hid. They did not want to take a call. They did not
2 want to resolve it. They did not want to look into it.
3 And so we're here. And now we trust you to weigh the
4 evidence, to weigh the credibility of each of the
5 witnesses that you've heard, to see who has been being
6 straight with you and who's been trying to misdirect
7 you, who's been giving you the full truth and who's been
8 giving you half truths.

9 Ladies and Gentlemen, TQP and I thank you
10 very much for your consideration in this case, and we
11 trust you and put this in your hands.

12 Thank you.

13 THE COURT: All right. Ladies and
14 Gentlemen, when you retire to the jury room to
15 deliberate on your verdict, you may take this charge
16 with you. And as I said, you will each have a single
17 individual copy of these final jury instructions or the
18 charge.

19 One of the first things you should do
20 when you retire to deliberate is to select your
21 foreperson from among the eight of you. The foreperson
22 will be responsible for signing the verdict form, once
23 you've reached unanimous verdict, and for signing any
24 notes or messages that are sent to the Court. After
25 you've selected your foreperson, you should begin your

1 deliberations.

2 You must perform your duties as jurors
3 without bias or prejudice as to any party. The law does
4 not permit you to be controlled by sympathy, prejudice,
5 or public opinion. All the parties expect that you will
6 carefully and impartially consider all of the evidence,
7 follow the law as I have given it to you, and reach a
8 just verdict regardless of the consequences.

9 Once you retire to deliberate, it then
10 becomes your sworn duty to discuss the case with one
11 another in an effort to reach an agreement, if you can
12 do so. Each of you must decide the case for yourself,
13 but only after full consideration of the evidence with
14 the other members of the jury.

15 While you are discussing the case, do not
16 hesitate to re-examine your own opinions or change your
17 mind if you become convinced that you were wrong.

18 However, do not give up on your own
19 honest beliefs solely because the others think
20 differently or merely to finish the case.

21 Your verdict on each issue must be
22 unanimous. When you've -- when you have reached a
23 unanimous verdict as to each question on the verdict
24 form, your foreperson is to fill in the answers on the
25 verdict form, sign it, and date it. Make sure that you

1 read the questions carefully, as some of them do not
2 require answers depending on how you answer the other
3 questions. Do not reveal your answers to any questions
4 until you are discharged by me.

5 Also, you should not reveal your
6 numerical division on any issue during the course of
7 your deliberations to anyone, even to me.

8 Once you begin your deliberations in the
9 jury room, you may feel a little overwhelmed, but this
10 is a complicated case. There's a lot of evidence and a
11 lot of argument to think about. But I think you will be
12 surprised as you start working methodically through the
13 case that things will come to you and become more
14 manageable. I hope and expect you'll listen to one
15 another's views even if you initially think differently
16 or disagree. Discussing the issues from different
17 perspectives can often help you formulate your own ideas
18 about how particular issues should be decided.

19 If you want to communicate with me at any
20 time during your deliberations, please have your
21 foreperson sign a written note or message and give it to
22 the Court Security Officer who will bring it to me.
23 If a note is sent by you to me during your
24 deliberations, I will respond as promptly as possible.

25 But I will always review your question or

1 your message with the lawyers before I respond to you.

2 As I mentioned, Ladies and Gentlemen,
3 this is an important case and you are an important part
4 of our jury system. I want you to remember, trust your
5 common sense throughout the deliberation process. Our
6 founding fathers in our country had great confidence in
7 the sound common sense of an American jury. And we have
8 the same confidence in your common sense in this case.
9 The parties have confidence in you, and so do I.

10 I will now hand eight copies of the final
11 instructions or charge and a clean copy of the verdict
12 form to the Court Security Officer, Mr. McAteer. And
13 I'll ask him to deliver that to you once you have
14 retired to the jury room to begin your deliberations.

15 Ladies and Gentlemen, all of us look
16 forward to receiving your verdict. You may now retire
17 to the jury room to begin your deliberations.

18 COURT SECURITY OFFICER: All rise.

19 (Jury out.)

20 THE COURT: All right. Counsel, we stand
21 in recess awaiting either a note or a verdict from the
22 jury.

23 MR. ALBRIGHT: Your Honor, I just --

24 THE COURT: I'll see you in a minute.

25 (Recess.)

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/_____
SHELLY HOLMES, CSR
Official Court Reporter
State of Texas No.: 7804
Expiration Date 12/31/14

Date